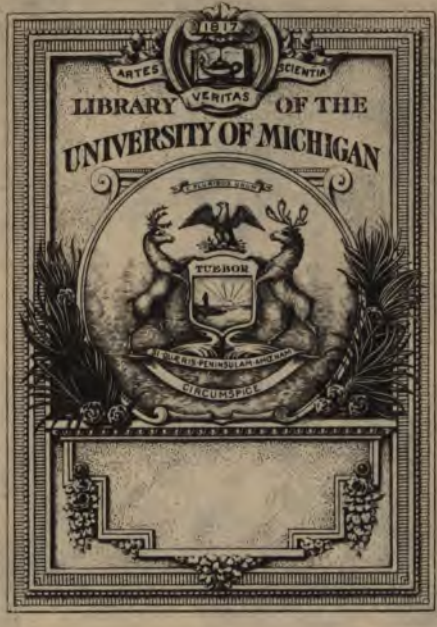
LEGAL RECREATIONS.

HUMOROUS PHASES OF THE LAW.

IRVING BROWNE.



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LEGAL RECREATIONS.

VOL. I.

Humorous Phases of the Law.

HUMOROUS PHASES

OF

THE LAW.

BY

IRVING BROWNE.

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PREFACE.

THE papers embraced in the following pages were originally published in the ALBANY LAW JOURNAL. The writer has been led to collect and publish them in the present form, *not* "at the solicitation of many friends and against his better judgment"—which is the usual form of expression in such cases—but in the hope that they may enliven a leisure hour of his brethren engrossed in a dry profession, and possibly amuse a few outside of the ranks of the law. For the benefit of the latter, he has added a few explanatory notes.

The cases cited in the following pages are all real, and the writer has not intentionally exaggerated or misrepresented any of them. In a great majority of instances he has consulted the original reports, and has not depended on second-hand citations. If any thing humorous shall be discovered in them, therefore, the reader may rely that the author has not made fun of the law, but has only allowed the law to make fun of itself.

The writer submits these papers to the public, hoping that his readers may find as much amusement in the perusal as he has found in the researches necessary to the preparation.

TROY, N. Y., *September*, 1875. I. B.

THE CONDUCT OF COURTS.

It is popularly supposed that the study and pursuit of the law are unattractive. It is true that the court-room is not a prepossessing apartment. To those unfortunates of our race who seem to have an innate bias toward depravity, its interior must be quite forbidding. It is somewhat awful, even to those unaccustomed litigants who approach it in a harmless way, to contest civil rights. It is peculiarly a bugbear to nervous women. To some sickly ladies the height of human infelicity seems to be an imaginary liability to be dragged to the witness stand. They know they never could live through it. We often wonder that their husbands do not contrive to have them subpœnaed, for the sake of the experiment.

But on more familiar acquaintance, these horrors wear away. The associations of the court-room are apt to degenerate into dullness, and its visitants are more prone to gape than to tremble; and yet, to one who is an habitual frequenter of its precincts, its lessons are not unmixed with the humorous. On entering its venerable portals, how quiet and drowsy is the aspect of every thing! The hall is shrouded in a dim, irreligious light; the sun, that usually unblushing orb, seems diffident about look-

ing in upon this mysterious realm of green baize and red tape. Long rows of corpulent books, almost buried in dust, suggest forgotten researches of scholars and jurists. The flies on the windows are of the fattest and laziest kind — regular chancery suitors; while the spiders that conceal their webs in the recesses of the dome, are marvellously agile and sharp — complete solicitors in their way. The sheriff's mastiff, sleeping at the door of the prisoners' box, has an extraordinarily severe and unfathomable countenance, the opposite of that of his master, who is, in most instances, a good-natured man. Half a dozen superannuated persons, bearing long and unwieldy poles, flit in a noiseless manner about the room, rendering themselves generally useless and in the way. There is a bald fat man, with spectacles, upon the bench, whose chief occupation seems to be to discomfit one or the other of two thin bald men, with spectacles, at the bar. Directly under the judge's bench sits the clerk, whose principal duties, or rather pleasures, are to make fees, and to construct good citizens out of all sorts of foreign materials in the rough. Close at his elbow, at this moment, sits a prisoner, who, with a broad grin on his face, is laboriously signing his name to a certain paper writing; well may he smile, for it is "his own recognizance" for bail that he is subscribing, and he is doubtless thinking what a "muff" the judge must be to let him off on such easy security. The aged crier, who looks as if he might have come over in the "Mayflower," rises and drones forth his mechanical "oyez," in the same whine that has characterized it ever since the

blessings of legal forms dawned upon our perishing race. The lawyers, who really act among themselves as if they are a good set of fellows, and seem unreasonably happy and jovial for persons having so much on their consciences, are talking and laughing, in no wise dismayed by the caution of the crier's formula. They evidently feel under no more restraint than the disrespectful son, whose father excused his sauciness, on the ground that they were so well acquainted that they said almost any thing they pleased to each other. "Silence in court!" says his honor, rapping the bench with the knife with which he has been peeling an apple while he read the morning newspaper; at the same time looking severely in every direction, except that from which the disturbance evidently comes. At this signal, the superannuated persons, bearing poles, agitate themselves out of their somnolency, making great pretense of activity in suppressing an imaginary tumult, and shortly go to roost on their poles again. All this time the hum of the great noisy world outside acts like a soporific on the senses.

"Call the grand jury," says the judge. After they are called, and sworn to keep all sorts of secrets, "including their own and their fellows," (and here seems to be a reason why women, in any millenium of female sovereignty, can never act as grand jurors), his honor appoints the most corpulent and inactive one as foreman. Then, after a caution from the old crier to the bystanders to "keep silence on pain of fine and imprisonment" (which seems quite unnecessary, because at this

juncture the spectators are always in breathless suspense to learn if it is possible for the judge to say any thing new), his honor rises, and the jury also rise, with unmixed awe and respect imprinted on their countenances, and his honor proceeds to charge them, "with horse, foot and dragoons." It is customary to observe in opening, that although they may properly be supposed to be somewhat familiar with their duties (which is not improbable, considering that the public are thus made acquainted with them three or four times a year), yet it is required of him to make a few general remarks. He then proceeds, at an hour's length, to inform them that they are the conservators of the public peace and the safeguard of society; that they are selected from the most intelligent and respectable portion of the community to protect their persons and property from the hand of the violent, and to point out the offender to public justice. He then overwhelms them with a sense of their tremendous responsibility, and the solemnity of their position. He then impresses on them the novel theory that no man is so high as to be above, nor so low as to be beneath, the reach of the law. He then opens up to them the terrible consequences which would ensue if they should fail to preserve strict secrecy as to their deliberations and proceedings, and gives them a timely caution to be impartial and unprejudiced. He then usually reminds them that their whole duty is pointed out in their oath, which he proceeds to analyze, making each component part the text for a short discourse of say fifteen minutes; but this, as it is merely a repetition of what

he has already said, it is unnecessary for us to go through. He then reminds them of the necessity of being utterly devoid of partiality and prejudice. Next he calls their attention to several offenses which our legislature have deemed so much more heinous than all others, as to be worthy of specific reprobation, such as vending intoxicating beverages to drunken men, without having paid the State for the privilege; lending money at the rate of interest which the parties think it worth, when it happens to exceed what the State thinks it worth; taking money from a candidate for voting for him when the purchased party would have voted for him in any event, and so forth. These injunctions are undoubtedly most excellent in a moral view, but are never known to produce the slightest practical effect. He then again exhorts them to divest their minds of every thing like partiality or prejudice. And finally he winds up, in a comprehensive, well-rounded and elaborate sentence (usually written beforehand), designed to comprise all that he has said before (with an additional remark about the impropriety of partiality and prejudice), and thus impress it on their minds; and with a bland and soothing reminder of the reliance that the community place upon their unimpeachable and unquestioned and unvarying integrity, intelligence and impartiality, he dismisses them to their secret chamber, under the guidance of one of the paralytics, who descends from his roost for the purpose. The reporters for the press are very busy all this time, and next day the newspapers, with remarkable unanimity, compliment his honor on his able,

learned and eloquent "charge to the grand jury." It has been frequently noticed that the said reporters, at or about the same time, are to be seen emerging in a body from some temple of Bacchus conveniently near the temple of justice, with a satisfied expression of countenance; and it has been likewise noticed that the grand jury are entirely oblivious to the fact that the priest of the first-mentioned temple is without orders or license, notwithstanding its propinquity to the last-mentioned temple.

Next, the clerk calls the petit jury, and the judge, if fresh in office, or not looking for a re-election, imposes fines on those delinquents who fail to appear and answer; but such fines are more for show than service, and are remitted on very trivial grounds. His honor then announces that he will hear excuses from jurymen, who desire to be relieved from the necessity of attendance. These excuses are as various as those of the guests summoned to the feast, in the parable, and comprehend every ailing and disability known to medicine, from bronchitis to bowel complaint, from piles to paralysis, from corns to consumption. Deafness is a standing excuse for not sitting, and where satisfactorily established, is allowed to prevail. A doubtful instance once arose in northern New York, where the juror alleging that he could hear only with great difficulty, the judge asked him if he did not hear his charge to the grand jury, just delivered? "Why, yes," was his reply, "I heard it, but I couldn't make head or tail of it!"

If any cause is ready for trial, the clerk calls a jury especially for the purpose. Perhaps there are

not names enough in the box. "Summon talesmen," says the judge. At this announcement there is an evident fluttering among the spectators, and if the cause is understood as likely to be tedious or protracted, as many of them escape by incontinent flight as can, while the sheriff singles out those who voted against him, or those against whom for any other reason he holds a grudge.

After the exercise of a good deal of professional finesse, a jury is secured, and the plaintiff's counsel opens the case. This is an admirable opportunity for the exercise of the imaginative faculties, for the jury, if the case is strikingly and glowingly presented, are apt to have a corresponding idea of it fixed in their minds, and no matter how much the testimony may fail to support it, an immense preponderance of opposing evidence is requisite to efface the impression.

Witnesses are then examined. Their oath is to tell the truth and nothing but the truth; but this means in answer to the questions of counsel and nothing beyond. And so if the witness is disposed to tell a little truth on his own account, he is checked, and his testimony is termed "irresponsive." Everybody is, of course, aware of the tortures inflicted on witnesses. The popular belief that no man, however truthful and intelligent, can preserve his consistency under the fire of cross-examination, is so firmly fixed that no efforts on the part of the profession can remove it. The prevailing difficulty is that no witness is content with simply answering a question, and indeed very few can answer the simplest question at all. Suppose

the witness is narrating a conversation, and says that in the course of it defendant called plaintiff a fool, a scamp, and a thief. "Will you swear," says Counselor Sharp, "that he used the word thief?" And the answer will be "I think he did," "I am quite sure he did," or "I am positive he did;" or any thing else but yes or no, the only possible answer to the question. The witness is willing enough and honest enough, but not reflective enough; or he is obstinate, and although he sees the point, is unwilling to admit that he cannot swear positively to the circumstance, because he has no doubt of it. So, after a while, under the skillful badgering of counsel, he becomes mad and almost desperate, affirms every thing his counsel asks him, negatives every thing else, and thus, rushing like a bull at a gate, beats out his brains against the stubborn subtleties of the law, and then out of court whines about the unfairness of counsel. Counsel are undoubtedly frequently unfair in the examination of witnesses, but their unfairness generally consists in taking advantage of the proneness of human nature to be unfair, or its inability to be candid. One would suppose that lawyers would themselves prove good witnesses, but the contrary is the fact; indeed there is but one class of witnesses less endurable, and that is physicians, who cannot divest themselves of the habit of lecturing and the use of technical language.

After the evidence is all in on one side, the opposing party proceeds to contradict, explain, modify, or discredit, and after he has had his "innings," the plaintiff goes at it again, and so on

until the case will admit of no further contradiction, explanation, modification, or discrediting, and then the jury are ready to be argued at. The defendant's counsel presents one view and then the plaintiff's counsel presents another entirely different, each invariably assuring the twelve that in the course of his professional practice he has never met with so clear a case for his client, and imploring them so to decide that they can lay their heads on their virtuous pillows at night with the proud consciousness of having rightly discharged their duties. And here let us observe, that the compliments of his honor to the grand jury are nothing to the flattery and eulogy which the counsel pour upon the heads of the petit jury. If a man wants to find out what a surprisingly clever and estimable fellow he is, let him get himself impaneled. But as there is no rose without its thorn, so the jury are not exclusively treated to these sweets. The denunciations which the counsel respectively avow themselves ready to heap on their heads, supposing them so lost to honor and rectitude as to decide against their client, are almost as fearful to contemplate as the curse of the Catholic church upon backsliders and heretics, and it is to avoid this awful contingency, perhaps, that juries so frequently disagree. This is the way in which these things strike a layman, but we suppose that among the profession they are all received in a Pickwickian sense. After the jury have been thoroughly kneaded in this way, the judge flattens them out with his rolling-pin of law, and stamps them with almost any tin pattern he pleases, in the shape of a charge. The counsel then

have a sharp encounter with his honor, to entrap him in some erroneous charge or a refusal to make some proper one, and thus obtain an exception on which to found a successful appeal. The jury then retire in charge of one of the paralytics and a pole, and are kept in strict seclusion on a light diet of water, until they agree, or until in case of disagreement the judge chooses to release them. The propriety of starving a jury into a verdict is one of the good jokes connected with the law, which it would take me too long to explain. The English of old times, having a much keener sense of humor than ourselves, used to cart the jury around, following the judge on his circuit, until they should agree; and it is even said that some intensely witty and pleasant fellows, like Scroggs and Jeffries, when the wretched creatures proved unyielding, would sometimes get rid of them by dumping them into some convenient ditch. It is true that now-a-days the counsel usually consent that the jury may be fed, but the *theory* of the law is now, just as it was under the aforesaid humorous judges, that they are kept "without meat or drink, water excepted."

And this is the ordinary course of a trial at law. In all these proceedings, that which strikes the spectator most forcibly is the prevalence of forms. Some of these forms are as old as the common law itself, and as little varied by lapse of time as the street cries of London. These seem singular, but are necessary. Legal affairs must be transacted in some settled and unvarying method. The error is in not accommodating these forms to the growing intelligence and civilization of the age, and in pre-

serving in the nineteenth century the quaint practices of the sixteenth. For instance, it would be difficult to assign any good reason for the practice of starving a jury into agreement, and as the practice has fallen into disuse, why should we preserve the theory?

Another striking feature of trials at law is the apparent equality of the contest. An unsophisticated observer would suppose. that as one side must be right and the other must be wrong, it would clearly and speedily appear which is right and which is wrong. But two skillful lawyers are like two experts at any game of skill or endurance, and the result is, that the clearest case becomes at least somewhat doubtful, and the event quite problematical. The arguments on both sides seem irrefragable as they are separately presented. The advocates elude one another's grasp like weasels. They are lubricated all over with the oil of sophistry and rhetoric. It is quite as difficult to put forward a suggestion that is not plausibly answered, as it is to make a run at base ball, or a count at billiards after a skillful player has left the balls in a safe position.

Another conclusion forced on the mind by observing the proceedings of courts is, that advocacy is much more easy than impartiality; that it is almost impossible for man to divest himself of prejudice and to overcome the force of habit and education. There is only one judge who is impartial, and even he has strong leanings against the wicked. So in almost every case we hear the judge discussing the facts, and arguing on probabilities and credibilities,

and in the same breath, instructing the jury that these questions are their peculiar province and entirely outside his own. Human nature is alike all over the world, in all times, in all stations. Man is a disputatious animal, and logically dies hard. Adam must needs dispute with the archangel. Therefore we must not blame our judges for taking sides. The Irishman's hands itch for a "shillalah" when he sees a "free fight" going on between a few of his friends, not so much for love of either party as to gratify an innate pugnacity, and if his own skull is cracked in the encounter he bears no malice. So the judge, when he sees so much fine logic flying about the heads of the jury, yearns himself to have an intellectual whack at them, and sometimes in his ardor his reasoning recoils, like the eastern boomerang, upon his own reverend head.

But finally, the most remarkable sensation that courts of justice are subject to, is experienced at the sight of a pretty woman. Let a comely and well-dressed woman enter the court-room, and at the first rustle of her silken gown, every man present seems to lose his head. Talk of the equality of the sexes! A man stands no more chance in a lawsuit against a good-looking woman, especially if she is in weeds, than he does of being saved without repentance, or of being elected to congress without spending money. Portia would have been even more potent in petticoats. The lawyer who should undertake to cross-examine a woman sharply would be considered a brute. Even to ask her age is a hazardous experiment. When she testifies to

hearsay, or what she said herself, or what she thought or thinks, or any thing else improper, the judge merely lays down his pen and smiles, and the jury believe every word of it. And whether party or witness, let her take out a black-bordered white handkerchief, and put it to her eyes, or nose — it makes no difference which — and the jury will treat her antagonist with about as much consideration as the early Christian martyrs received from the wild beasts at Ephesus. A man may be put off with sixpence; a woman's verdict always carries costs. Even the gallows has no terrors for her; its noose relaxes and refuses to clasp her fair neck; it is only when it embraces Adam's apple that it preserves its hold. And yet the women are trying to break this spell by becoming lawyers and jurymen! It would not surprise me if they should succeed in getting hanged, if they accomplish this purpose. The charm of their unaccustomed and artless presence will be gone, and if they demand the privilege of acting like men, they will perhaps be treated like men.

THE LAW OF SUNDAY.

SUNDAY is not a court day — *dies Dominicus non est juridicus.** Service of process, arrest in civil actions, and all that sort of thing, are prohibited on that day, universally. In this respect, however, it is not much more sacred than election day. No trial can be held on Sunday. The only trials which the lawyer can then lawfully be subjected to are those which he undergoes in listening to the clergy, who make him a frequent subject of reproach. The only court permissible on that day is such as lovers, according to immemorial custom, pay to the objects of their adoration. Sunday was not always held thus sacred from the demands of Themis. It did not become so until the year 517. Originally the Christian courts were open on Sunday to prevent resort to the heathen courts. But, with these exceptions, all business transactions are valid at common law, "however wrong or unbecoming in morals they may be considered." † It is not proposed in this paper to examine the law of Sunday with much minuteness, or with any regard to the modifications of the common law wrought by the numerous statutes of the various States of our Union.

Washington, in his diary, under date of November 8, 1789, in journeying through Connecticut,

* Story *v.* Elliott, 8 Cowen, 27. † Merritt *v.* Earle, 31 Barb. 41.

remarks, "It being contrary to law and disagreeable to the people of this State to travel on the Sabbath day, *and* my horses, after passing through such intolerable roads, wanting rest, I stayed at Perkins' tavern (which, by the by, is not a good one) all day; and a meeting-house being *within a few rods* of the door, I attended morning and evening service, and heard very lame discourses from a Mr. Pond." (Pond's sermons had probably traversed the same roads.) Connecticut has improved her inns and the intellectual character of her preaching, and has mended her ways, but has not altered the particular law spoken of. At least, Sunday traveling and work are still prohibited, except in cases of necessity and mercy. The running of the Sound steamboats seems to be considered necessary or merciful, however, and as an incident, it was held by a New York court, that the fact that the plaintiff left the boat on Sunday made no difference, under the Connecticut Sunday law, as to her right to call for her trunk.* If delivering it would have been work or labor, within the statute, it was a work of necessity. And so, where she neglected to call for her trunk for seventeen hours, and it was put in the steamboat company's warehouse, where it was burned, it was held that she could not hold them as common carriers. As to the Sunday work, she and they were in the same boat.

In Massachusetts it is not only unlawful to travel on Sunday, except from necessity or charity, but a

* Jones *v.* Norwich and N. Y. T. Co., 50 Barb. 193.

fine of $10 may be inflicted for every violation. There is certainly no fun in *that*, but there is in some of the decisions on the subject. A person cannot legally travel on the Lord's day for the purpose of supplying fresh meat to marketmen, whom his master has agreed to supply, although he could not do this, in addition to his other work, on Monday morning, and his master was too sick to do it himself; and consequently, if while so traveling he sustain an injury on account of a defective highway. he cannot recover damages therefor.* The plaintiff offered to prove, among other things, that he was his master's only servant, and at that season fresh meat was only fit for use on Monday when slaughtered and dressed on Sunday. But the judge said, that "it was too clear to admit of discussion," and so this wicked servant had to bear his smarts unrecompensed. The judge undoubtedly was not one of the persons who suffered from the "temporary inconvenience caused by the failure to supply provisions on Monday." If he had been, he might have undergone a state of mind which even the recollection of the previous day's exercises could not have soothed. But, as it was, the court held that the servant received a meet punishment for his transgression, and thus the sound morality taught at the famous theological seminary at Andover, and recognized by the Massachusetts statutes, saved that town from a bill of damages. Truly, virtue is its own reward. But this is not the only case showing the prudence with which

* Jones *v.* Inhabitants of Andover, 10 Allen, 18.

Massachusetts reconciles a due observance of Sunday with the inviolability of the public purse. It is a work of necessity for the public to repair the highway on Sunday in order to prevent accidents on Monday.* So held in an action for damages occurring on Monday, through a defect in the highway, the defendant setting up as a defense that it would have been unlawful to repair the road on Sunday. The court wisely held that no day was fitter than Sunday for a community to mend its ways.

To visit one's father on Sunday is a work of necessity or charity; so held in Pennsylvania, in the case of the hire of a horse and wagon.† But in Massachusetts it was left undecided whether a young man who worked at a distance during the week, and received injuries arising from a defect in the highway, while proceeding to visit his betrothed on Sunday, was a lawful traveler.‡ This is a case calculated to arouse the indignation of every well-regulated young woman in the land. Is a mere father to be preferred to a contingent wife and mother? It might, in the long run, be a work of mercy to the young woman if the young man would let her alone, or confine his attentions to epistolary communications, thus giving her an opportunity to take her natural rest and sleep, and reflect on the lessons of the day. But such "odorous comparisons" between fathers and contracted wives are not to be tolerated.

* Flagg *v.* Inhabitants of Milbury, 4 Cush. 243.
† Logan *v.* Matthews, 6 Penn. St. 417.
‡ Buffington *v.* Swansy, 2 Am. Law Rev. 235.

The New York statute, with a view to restricting inordinate and excessive church-going, has wisely provided that no one shall ride more than twenty miles to church on Sunday. In England they have very liberal ideas as to what constitutes a traveler. A statute provided that no licensed victualer should sell wine or ale on Sunday, except "as refreshment for travelers." (This puts one in mind of the late lamented Artemus Ward, who never indulged in intoxicating drinks, "except as a beverage.") A. walked on Sunday to a spa, two and a half miles from his house, for the purpose of drinking the mineral water there for the sake of his health, and was supplied with ale at a hotel at the spa. He was held to be a traveler within the exception*. This statement leads one to suspect that the attraction at the spa was the hotel and not the mineral water, and that all that ailed the traveler was what he procured at the hotel. And in Massachusetts it was mercifully held, that one who received injuries on Sunday, through a defect in a street in Boston, while walking half a mile to his own house, was not traveling, within the meaning of the Lord's day act.† If the defendants had shown that the plaintiff had accomplished half a mile *in a straight line*, the decision must have been different.

Massachusetts was impartial in its administration of its laws, at all events, for in 1793 the Chief Justice of the State and his associates were indicted for traveling on Sunday, and were compelled to petition the legislature to authorize a *nolle prosequi*.

* Peplow *v.* Richardson, 4 C. P. 168.
† Hamilton *v.* City of Boston, 2 Am. Law Rev. 236.

Although one carrying the mails on Sunday could not be arrested, yet his passengers might be. This is hardly consistent with Scripture: "Offenses must needs come, but woe to him by whom the offense cometh."

It is a misdemeanor in Massachusetts to perform any labor on Sunday, except work of necessity or charity. The principle of the maxim, *ne sutor ultra crepidam*, was enforced in a recent case in that precise commonwealth,* in which the defendant, a shoemaker, was indicted for hoeing in his garden on the Lord's day. The only witness for the government — an early riser, it seems — testified, that about eight o'clock in the morning of Sunday, he saw this dangerous shoemaker hoeing for about an hour in the garden near his house. The defendant testified, that for two days next preceding the day in question, he had not worked at his trade, but had given the greater part of his time to cultivating his crops at home, and had been engaged in that labor by moonlight on Saturday evening; that when he left off work on that evening, "a few hills remained unfinished, and in very bad condition, and suffering for want of hoeing;" and these, we infer, he finished on the next morning, contrary to the form of the statute in that case made and provided, and being thereunto moved and instigated by the wiles of the devil. It did not appear whether or not he went to church after it. Probably not; how could he with such a weight of wickedness on his soul? He asked the court to submit the question of the

* Commonwealth v. Josselyn, 97 Mass. 411.

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* Commonwealth v. Josselyn, 97 Mass. 411.

gathering it would recur, and that the gathering of it is an ordinary branch of agricultural labor. The case does not disclose how the witnesses for the commonwealth happened in a position to have their quiet and peace of mind disturbed by the riotous and unholy conduct of the defendants on that beach, "a considerable distance from any house or public road," at ten o'clock at night. If the lateness of the hour were not inconsistent with such a theory, we might imagine that they availed themselves of a spy-glass, as did those old maids who complained of a man who went a-swimming half a mile from their house. And how the naughty judge should tolerate, even in imagination, an exception in favor of that "whale," with the example of Jonah before his mind, we cannot imagine. And suppose a whale should come along on Sunday; *non constat* that another would not come on Monday, and a whole school during the week. But his honor's mind was evidently affected by the idea that a whale on the beach is worth two in the sea, and that "a large amount of accessible value" is not to be passed by, even on Sunday. The idea is not a new one, but has long prevailed in the coast towns of Cape Cod. A clergyman was once holding forth to his congregation on Sunday morning — on the vanity of human riches, perhaps — when a man rushed in with the alarm, "Skewner ashore!" The audience arose *en masse*, and made a stampede for the doors, but were arrested by the voice of their shepherd, who exclaimed in stentorian tones, "Brethren, before you leave, I've one last word to

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A man may make his will on Sunday, anywhere, even in Massachusetts.* In that State the right seems to be put on the ground of its "fitness and morality." In New Hampshire it seems to be supported by the numerous good words usually placed at the commencement of the document,† the counsel in their brief having made "a most interesting collection of the opening words of wills, selected through a period of a hundred years," and arguing therefrom that the act is usually regarded in New England as a religious one. Truly, if we trust to wills and epitaphs, the world has lost none but religious people. What a shock, then, we receive in a Pennsylvania case, which upholds the right mainly on the ground that the will does not take

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fine of $10 may be inflicted for every violation. There is certainly no fun in *that*, but there is in some of the decisions on the subject. A person cannot legally travel on the Lord's day for the purpose of supplying fresh meat to marketmen, whom his master has agreed to supply, although he could not do this, in addition to his other work, on Monday morning, and his master was too sick to do it himself; and consequently, if while so traveling he sustain an injury on account of a defective highway. he cannot recover damages therefor.* The plaintiff offered to prove, among other things, that he was his master's only servant, and at that season fresh meat was only fit for use on Monday when slaughtered and dressed on Sunday. But the judge said, that "it was too clear to admit of discussion," and so this wicked servant had to bear his smarts unrecompensed. The judge undoubtedly was not one of the persons who suffered from the "temporary inconvenience caused by the failure to supply provisions on Monday." If he had been, he might have undergone a state of mind which even the recollection of the previous day's exercises could not have soothed. But, as it was, the court held that the servant received a meet punishment for his transgression, and thus the sound morality taught at the famous theological seminary at Andover, and recognized by the Massachusetts statutes, saved that town from a bill of damages. Truly, virtue is its own reward. But this is not the only case showing the prudence with which

* Jones v. Inhabitants of Andover, 10 Allen, 18.

Massachusetts reconciles a due observance of Sunday with the inviolability of the public purse. It is a work of necessity for the public to repair the highway on Sunday in order to prevent accidents on Monday.* So held in an action for damages occurring on Monday, through a defect in the highway, the defendant setting up as a defense that it would have been unlawful to repair the road on Sunday. The court wisely held that no day was fitter than Sunday for a community to mend its ways.

To visit one's father on Sunday is a work of necessity or charity; so held in Pennsylvania, in the case of the hire of a horse and wagon.† But in Massachusetts it was left undecided whether a young man who worked at a distance during the week, and received injuries arising from a defect in the highway, while proceeding to visit his betrothed on Sunday, was a lawful traveler.‡ This is a case calculated to arouse the indignation of every well-regulated young woman in the land. Is a mere father to be preferred to a contingent wife and mother? It might, in the long run, be a work of mercy to the young woman if the young man would let her alone, or confine his attentions to epistolary communications, thus giving her an opportunity to take her natural rest and sleep, and reflect on the lessons of the day. But such "odorous comparisons" between fathers and contracted wives are not to be tolerated.

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*Flagg *v.* Inhabitants of Milbury, 4 Cush. 243.
†Logan *v.* Matthews, 6 Penn. St. 417.
‡Buffington *v. Swansy*, 2 *Am.* Law Rev. 235.

moral propriety and fitness of the work to the jury, but this was refused; he was convicted, the court on appeal overruled his exceptions, and, for aught we know, he is pegging shoes for the benefit of the righteous old Bay State, while ill weeds disfigure his garden-patch, and his temporary widow and his little ones "go bare," like the little colt in the nursery rhyme. It is to be hoped, if this wretched shoemaker ever emerges from durance, that he will reform and try to become a worthy member of society, but we have great fear and little hope of him. The domestic tragedy thus inadequately set forth is cordially recommended to the dramatist of the American Tract Society, who cannot fail to turn it to good use, by making it the subject of a glowing diatribe suited to the meridian of Massachusetts. The same volume of reports also contains an account of another dreadful infraction of human and divine law, which is worthy of our consideration.* The defendants, who were farmers, had a license, for which they made an annual payment, from the owner of a beach, about four miles from their residence, to gather sea-weed thereon, which is valuable and in common use for manure. A storm on Saturday having thrown up a large quantity of sea-weed, the defendants, about *ten o'clock on Sunday evening*, gathered it from the space between high and low-water mark, and drew it higher up the beach, the tide being low, and a strong wind blowing in a direction which had frequently caused the sea-weed to float away and be lost. Under the

* Commonwealth v. Sampson, 97 Mass. 407.

instructions of the court the jury found the defendants guilty, and their exceptions were overruled. The things which may lawfully be done on Sunday were enumerated in the opinion of the court: "To save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood or tempest, or other unusual peril, would unquestionably be acts which fall within the exceptions. But it is no sufficient excuse for work on the Lord's day, that it is more convenient or profitable if then done than it would be to defer or omit it." (Now, is it any worse to acquire property on Sunday than to save it on that day?—property which can be acquired only on that day? The judge answers this question in his next sentence.) "If a vessel had been wrecked upon the beach, it would have been lawful to work on Sunday *for the preservation of property which might be lost by delay.* But if the fish in the bay or the birds on the shore happened to be uncommonly abundant on the Lord's day, it is equally clear that it would furnish no excuse for fishing or shooting on that day. *How it would be if a whale happened to be stranded on the shore,* we need not determine." (In answer, probably, to an illustration of counsel.) "Whether a case wholly exceptional, and *involving a large amount of accessible value,* would require any modification of the rule is not now in question." He then goes on to say that the deposits of sea-weed are frequent; that in this case the property had not been reduced to possession, and afterward put to hazard; that equally good opportunities of

gathering it would recur, and that the gathering of it is an ordinary branch of agricultural labor. The case does not disclose how the witnesses for the commonwealth happened in a position to have their quiet and peace of mind disturbed by the riotous and unholy conduct of the defendants on that beach, "a considerable distance from any house or public road," at ten o'clock at night. If the lateness of the hour were not inconsistent with such a theory, we might imagine that they availed themselves of a spy-glass, as did those old maids who complained of a man who went a-swimming half a mile from their house. And how the naughty judge should tolerate, even in imagination, an exception in favor of that "whale," with the example of Jonah before his mind, we cannot imagine. And suppose a whale should come along on Sunday; *non constat* that another would not come on Monday, and a whole school during the week. But his honor's mind was evidently affected by the idea that a whale on the beach is worth two in the sea, and that "a large amount of accessible value" is not to be passed by, even on Sunday. The idea is not a new one, but has long prevailed in the coast towns of Cape Cod. A clergyman was once holding forth to his congregation on Sunday morning — on the vanity of human riches, perhaps — when a man rushed in with the alarm, "Skewner ashore!" The audience arose *en masse*, and made a stampede for the doors, but were arrested by the voice of their shepherd, who exclaimed in stentorian tones, "Brethren, before you leave, I've one last word to

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In England the disposition of late years has been to construe Sunday law very liberally, and not to presume any thing in favor of those claiming the infraction. A very marked contrast to *Varney* v. *French* is *Triggs* v. *Lester* (Law Rep. 1 Q. B. 259), in which it was held that driving with horses a van in which calves are being conveyed to market, is not within a statute which forbids any drover, or other person, from "conducting or driving" any cattle or horses through the streets on Sunday. The statute in question is applicable only to "merry Islington," a great cattle market, and was probably passed to keep that town secure from "the gambols" of John Gilpin, "when he next doth ride abroad."

An article in the London *Law Times*, on "Sunday Prosecutions," states that "a society professing for its object the promotion of the religion of charity, liberty and love, is busy in the east of London laying informations against crossing-sweepers, newsboys, tobacconists and small tradesmen, for infringing an old and almost forgotten statute of Charles II, which imposes upon any person pursuing his calling on Sunday a certain penalty." The magistrate inflicts a fine of a penny, and refuses costs to the informers, who have gone to the Queen's Bench. The *Times*' writer is indignant at the conduct of the society, but, except in regard to the sweepers, I think they are right. "Wherewithal shall a young man cleanse his ways," if these useful persons are restrained of their brooms on Sunday? But the "calling" of Sunday newsboys is insufferable, and as for the tobacconists, "the smoke of their torment ascendeth up forever and ever."

THE LAW OF NECESSARIES.

EVERY husband is theoretically bound to support his wife; that is, to supply her with necessaries suitable to her situation, and his own circumstances and condition in life. The same is true as to father and child. And as a corollary, if the husband or father fail to do this, third persons may do it, and the party on whom the duty rests must respond. If the wife live with the husband, an agency to contract for necessaries is presumed in her favor; and if without him, his duty still exists. An infant, away from home, may bind himself by his contract for necessaries. But as to what are and what are not necessaries, there has been a great deal of discussion, and the line of distinction is by no means well defined. *Lear* was made to say:

> "Our basest beggars
> Are in the poorest things superfluous:
> Allow not nature more than nature needs,
> Man's life is cheap as beasts'."

And another poet says:

> "Man wants but little here below,
> Nor wants that little long."

But the law takes a very different view of man's wants. The maxim of the law on this subject would seem to be: *Id necesse est quod necesse reddi potest.* In view of the disposition to enlarge the catalogue of necessaries, it may well be said that necessity knows no law, and is the mother of invention. The law has long since outmarched the great

leading case on the subject of necessaries, reported by Defoe, *Robinson Crusoe,* and the equally authoritative case of *Swiss Family Robinson,* and the scripture maxim seems to be the rule: "To him that hath shall be given, but from him that hath not shall be taken away even that which he hath."

The wife's necessaries are such as the law deems essential to her health and comfort: food, lodging, clothing, fuel, washing, medical attendance, etc. These are to be determined, both in amount and kind, by the means and social position of the husband and wife. Not by their real position, but by their apparent and assumed position. If the husband's position is an imposition, still he is estopped from setting up that fact. The lawful measure of mercantile phlebotomy seems to be what the husband's apparent venous system will afford. If he has passed in society as a blood, it is in vain for him to deny his fullness when called on to pay his bills. What says Goldsmith — *qui nihil tetigit quod non ornavit?*

> When lovely woman stoops to quarrel,
> And from her husband goes astray,
> What charm can hide affairs immoral,
> What art can chase his duns away?
>
> The only chance to quell the riot,
> And hide the quarrel from the day,
> The scandal hush, and keep those quiet
> Who ring his door-bell, is to *pay.*

In the new era of perfect equality between the sexes, which is dawning, it will be worth while to notice whether the law of necessaries will be extended in favor of husbands as against wives, and

if so, what articles it will embrace — whether a club, cigars, night-key, etc., will be among them.

But to descend to particulars. New bonnets to a reasonable extent are doubtless necessaries, although fashion does not seem at present to regard any covering for the female head as indispensable. *King Lear*, who is quite an authority on the subject of necessaries, expresses himself sensibly on the particular branch of mantua-making and millinery; one would almost imagine him a modern husband and father of girls:

> "Thou art a lady;
> If only to go warm were gorgeous,
> Why, nature needs not what thou gorgeous wear'st,
> Which scarcely keeps thee warm. But, for true need,
> You heavens, give me that patience, patience I need!"

The courts have been very mean toward the ladies on the subject of millinery. Thus in *Atkins* v. *Curwood* (7 C. and P. 759), the court held the husband, a poor barrister, not bound for sundry dry goods, to the trifling amount of £67, ordered by his wife as an outfit for a watering-place, whither her husband had brutally forbidden her going. And in pronouncing the judgment, Lord Abinger heartlessly said: "Let the wedding dresses be struck off." Then, too, in *Lane* v. *Ironmonger* (13 M. and W. 368), bonnets, laces, feathers and ribbons, to the insignificant amount of £5,287 in part of a year, were fiendishly declared extravagant by the same cold-blooded judge. Verily, his sins against the angelic sex are like his name — Scarlett. Furniture of a house, for a wife to whom the court

had decreed £380 a year as alimony, was held necessary.* It appearing to the court that the wife had nothing to sit on, or eat from, they took a charitable view of her necessities. It is much better, it seems, to be a special pleader than a sergeant at law, for while articles of jewelry were held superflous for the wife of the former,† the latter was held liable for silver fringes to a petticoat and side-saddle, value £94.‡ This seems to be based on the principle of natural philosophy, that the higher one rises the more he has to "come down." I dare say that unfortunate sergeant regretted the bridal that rendered such a luxurious saddle necessary. A horse worth $40, prescribed by a physician for exercise to the invalid wife of a miller earning $30 per month, was held necessary.§ This must have been a grinding decision to that husband. Probably, in his indignation, he tolled it to all his customers. But this was hardly more grinding than that other case, which compelled the husband to pay for his wife's false teeth.‖ Would not this have been a proper case for the incidental application of the maxim: *Falsus in uno, falsus in omnibus?* But the doctrine of estoppel was invoked in this case — it appearing that the husband knew of the procural of the plate, and did not object, the court said it did not lie in *his* mouth to repudiate the implied contract. In another case the court inclined to hold a piano necessary, under some circumstances,¶

* Hunt *v.* DeBlaquiere, 5 Bing. 550.
† Montagu *v.* Benedict, 3 B. and C. 631.
‡ Skin. 349.
§ Cornelia *v.* Ellis, 11 Ill. 584.
‖ Gilman *v.* Andrus, 28 Vt. 241.
¶ Parke *v.* Kleeber, 37 Penn. St. 251.

which is quite in harmony with the tenor of authority. The law, with a lively sense of its own worth and dignity, considers necessary the fees paid by a wife, whose husband had deserted her, for professional advice as to the proper mode of dealing with tradesmen who were pressing for payment.* What advice was given is not disclosed, but probably it was *not* to deal with them.

But there are some things that are not necessary. For instance, where money was lent for the purchase of a passage ticket to enable the wife to join her husband, the court held such joinder of parties unnecessary, and the money not recoverable.†

At common law the husband is not bound to furnish the file to sever the marriage fetters; counsel fees in a suit for a divorce, whether the wife be plaintiff or defendant, are not a necessary.‡ So, too, in regard to the expense of an indictment by the wife for assault. § In this case the judge said: "It cannot be maintained that an indictment against the husband for assaulting his wife is a necessary." To hold otherwise would be like compelling St. Lawrence's executors to pay for the gridiron on which he was roasted. I presume the true principle of this decision is that the indictment would be such a luxury to the wife's feelings as to take it out of the list of necessaries. Although, as has been stated, medical attendance is generally considered a necessary, yet a quack's bill was thrown

*Wilson *v.* Ford, 3 Ex. 63.
†Knox *v.* Bushell, 3 C. B. (N. S.) 334.
‡Coffin *v.* Dunham, 8 Cush. 404.
§Grindall *v.* Godmond, 5 Ad. and El. 755.

out in a case where the services were rendered without the husband's assent.*

This is an amusing case in several particulars. The plaintiff was in the habit of putting one Mrs. Davis into a mesmeric sleep, and thereupon she became a *clairvoyant* and prescribed the medicines, which the plaintiff furnished. After payment of all expenses the profits of this course of business were equally divided between the plaintiff and Mrs. Davis. The defendant claimed, in addition to the ordinary doctrine of necessaries, that the plaintiff and Mrs. Davis were partners, and that the plaintiff alone could not maintain the action. On the main point Judge Fletcher, a wise judge and a merry, observed: "The law does not recognize the dreams, visions or revelations of a woman in a mesmeric sleep as necessaries for a wife, for which the husband, without his consent, can be made to pay. These are fancy articles, which those who have money of their own to dispose of may purchase, if they think proper, but they are not necessaries known to the law, for which the wife can pledge the credit of the absent husband." On the question of partnership, the court, with more literal correctness than ordinary, said: "It is not necessary that a *dormant* partner should join with the ostensible partners of a firm in an action against a person who dealt only with the ostensible partners."

Another case in which the defendant was held not responsible for "fancy articles" is *Freestone* v. *Butcher* (9 Carr & Payne, 643). The plaintiff was

* Wood v. Kelly, 8 Cush. 406.

a dealer in foreign birds. The defendant was curate of Milton. The action was brought to recover £757, balance of £959, for live foreign birds supplied to the defendant's wife, from February to December, 1839. The defendant and his wife lived together in the rectory house at Milton, where the defendant had caused a room to be fitted up as an aviary. Between six and seven hundred birds, mostly foreign, consisting of lories, avadavats, love birds, bishop birds, cardinals (appropriate enough for a curate's wife), quakers, cut-throats and manikins, had been delivered there by coach. In March, 1840, the defendant sold about two hundred of the birds for £110, and wrote a dunning letter for part of the price. The birds had been charged to "Mrs. Dr. Butcher" in the plaintiff's books, and the plaintiff had drawn bills on her, which she had accepted, and which had been paid out of her moneys, she having a separate income and bank account. It was held that the circumstances did not show any agency on the part of the wife to bind the husband, and that the birds were not necessaries. It came out that the doctor had once prayed an allowance from the court of chancery for the maintenance of his children, and Lord Abinger thought that if he needed that, his wife did not need "avadavats and mocking-birds." On the point of agency, he put the illustration of a wife's ordering "five puncheons of rum and five hogsheads of sugar," as an example of an excessive order, but his lordship did not have the temerity to intimate that, if the five puncheons of rum had been reasonable, the five hogsheads of sugar would

not have been an appropriate concomitant. But such a vulgar illustration was what one might expect from a judge who would debar the fair sex of their just millinery.

Money, the prime necessity of life, was not regarded at law as necessary, for when lent to the wife, without the husband's request, although to purchase necessaries, it was held not recoverable.* But this was corrected in equity, if the money actually went for necessaries, the lender being, by a stretch of conscience, put in the place of the tradesman, and allowed to recover.† This seems a very unnecessary circumlocution. It is one of the particular beauties of that system of jurisprudence, in which law is one thing and justice another.

Infancy is an age of numerous demands. This is true in law as in nature. The older a man grows the fewer his needs. Thus *Lear* says:

"Age is unnecessary; ‡ on my knees I beg
That you'll vouchsafe me *raiment, bed and food.*"

Infancy is generally regarded as the age of helplessness; but in law an infant has the power to help himself to his neighbor's goods without compensation, unless they come within the description of necessaries, or the neighbor within that of extraordinarily prudent men. An infant's necessaries are judged by the same rules as those of a married woman, and are the same, with one addition — education. This is denied to women, theoretically, because they are presumed to have acquired it sufficiently before marriage; but, virtually, because it

* Stone *v.* McNair, 7 Taunt. 432.
† Walker *v.* Simpson, 7 W. and S. 83.
‡ That is, has few wants.

is of so little use to them after marriage. The theory of the common law is that women do not need to know any thing, except enough to get a husband; the husband "knows it all." Even the infant's necessary education is limited; it does not include a collegiate course.* In this case the judge thought "a good common-school education" might be "strongly pronounced" as necessary. Inasmuch as the free-school system prevails in Vermont, I am inclined to agree with him. But there is a case on the subject of education even more illiberal than this, and which leads us to doubt Lamb's soundness when he supposed that "lawyers were children once." "The treats of an undergraduate at college are not necessaries."† Such is the brief and contemptuous language of the law in a case in which it appeared that the defendant, when an infant at college, was under medical treatment for measles and inflammation of the lungs, and was ordered to take fruit, marmalade, ices and soda water, and that he merely invited his infantile mates to help him make way with this nauseous physic. It also appeared that his father was in affluent circumstances, and was governor of Ceylon. An intelligent and incorruptible jury, bearing in mind the language of the missionary hymn which they sang when infants:

—— "the spicy breezes
Blow soft from Ceylon's isle,
And every prospect pleases,
And only man is vile," —

were pleased to hold the governor's son responsible

* Middlebury College v. Chandler, 16 Vt. 683.
† Brooker v. Scott, 11 M. and W. 67.

for these sugar-coated symposia. But the court above, having no such views of physic, held them superfluous. It not appearing that the infant guests were troubled with measles, or that if they were, it was the province of the governor's son to cure them, the court decided that they would not break out of well-settled rules, and so destroyed the credit of that physician's prescriptions with that particular apothecary. Of a piece with this are the old decisions which frown on balls and serenades, holding Terpsichore and Polymnia to be ornamental and not useful maidens. Perhaps more respect would be paid to the claims of these muses in these days, when a prima donna receives more than a chief-justice, and the balancing of a chancellor is less lucrative than that of a ballet dancer. A pair of solitaires (or shirt studs) worth £25 are not, it would appear, necessaries for any infant.* So in regard to a stud of horses.† Betting books are not necessaries.‡ Better use might be made of them. This was an action on account to recover of the defendant, an infant at the time when the debt was contracted, about £200, for ornamental stationery and jewelry, including ear-rings, cigar cases and betting books. It was shown that this precocious debtor had, in his infancy, contracted debts to the amount of £40,000, a wife and a baby. In answer to the chief-justice's question whether a wife were a necessary, Sergeant Hawkins replied, "not for a youth of twenty, and that if she were, a baby was

* Ryder v. Wombwell, 4 Exch. 32.
† Merriam v. Cunningham, 11 Cush. 40.
‡ *Genner v. Walker*, 3 Am. Law Rev. 590.

not." (The learned sergeant evidently knows more of law than of matrimony.) In regard to the earrings, the chief observed: "If they were purchased for one young lady, and the defendant was engaged to marry another, they could not be necessary." This seems hard; if he did not marry the first, this Cockney lover at least wanted to give her a hearing. Saddles, harness and carriages may, under some circumstances, be necessaries, but ordinarily are not.* Presents from a bridegroom to his bride may be necessaries.† So much is allowed to Cupid and cupidity. And so, on such occasions, the law tolerates a certain amount of smartness, and deems wedding garments necessary for an infant about to marry.‡ Law and gospel agree in this, only the latter makes them indispensable. To military gentlemen a similar concession is made, and the uniform of an officer's servant is adjudged necessary; but not cockades for his whole company; nor in another case would the court stand a tailor's bill of £840 for thirteen months, including 19 coats, 45 waistcoats and 38 pairs of trousers.‖ But to other people dandyism is superfluous — no kid gloves, cologne, silk cravats or walking canes.§ An insurance contract is not a necessary, say the books,¶ but this cannot apply to life insurances, which are as unavoidable now-a-days as taxes. An

* Harrison *v.* Fane, 1 Man. and Gr. 550.
† Genner *v.* Walker, 3 Am. Law Rev. 590.
‡ Sams *v.* Stockton, 14 B. Monr. 232.
‖ Hands *v.* Slaney, 8 Term, 578; Burghardt *v.* Angerstein, 6 C. and P. 690.
§ Lefils *v.* Sugg, 15 Ark. 137.
¶ N. H. Ins. Co. *v.* Noyes, 32 N. H. 345.

infant's board is a necessary,* but not so with timber to repair his house.† And, finally, to come down to the matter of greatest interest to our profession, counsel fees in a suit about the infant's real estate are said not to be necessary.‡ The Connecticut courts hold that there is no just ground for this rule,‖ and this seems more consonant with reason, for a suit is frequently the only means by which the infant can be redressed. But the case which most astonishes us is one in which the English court recently decided, that, unless special circumstances are shown, tobacco is not a necessary to any infant! How this reads, when we are informed that at a recent dedication of a new inn of court, the lord high chancellor, the lord chief-justice, and many of the judges and most eminent counselors of England, smoked after dinner in the withdrawing room, with and out of compliment to the Prince of Wales! Perhaps this is one of the "special circumstances" under which the use of tobacco would be tolerated in an infant.

The measure of necessaries is affected by the character of the tribunal to which it is left to decide. As we have seen, courts are always restricting the verdicts of juries on this point. Twelve men have so many more wants than one man, that they naturally take a larger view of the subject. In the solitaire case, it was held that the question was one for the judge and not for the jury, and accordingly the

* Bradley *v.* Pratt, 23 Vt. 378.
† Freeman *v.* Bridger, 4 Jones' Law, 1.
‡ Phelps *v.* Worcester, 11 N. H. 51.
‖ Munson *v.* Washband, 31 Conn. 303.

verdict was set aside. Justice Coleridge, in the betting-book case, remarking on this, observed: "It would make the determination of these cases turn too much upon the individual tastes or ideas of the judge. For instance, as to smoking, Sir Benjamin Brodie vehemently objected to it; and perhaps a judgment against cigar cases might result from Baron Bramwell's disliking it." The better doctrine seems to be, that it is a question for the jury, unless they are too liberal, and then it becomes a question for another jury. Thus juries are "pressed" into right verdicts, as Pat was "to turn volunteer." The admission of women to the jury box will probably render pretty much every thing in the shops necessary for wives and infants. A bitter day will that be for the ghost of the wretched Abinger!

WAGERS.

No. 145 of the *Spectator* is mainly devoted to a complaint against wagering disputants at the coffee houses. It seems they were mostly law students: "I will not here repeat what Hudibras says of such disputants,* which is so true that it is almost proverbial; but shall only acquaint you with a set of young fellows of the inns of court, whose fathers have provided for them so plentifully that they need not be very anxious to get law into their heads for the service of their country at the bar." One of these offensive and unlearned, but wealthy young gentlemen (the correspondent goes on to complain), offered to lay him ten guineas that he had misquoted a passage from Tacitus, and the correspondent "was dumb for want of ten guineas." This same young gentleman, he continues, "has five guineas upon questions in geography, two that the Isle of Wight is a peninsula, and three guineas to one that the world is round. We have a gentleman comes to our coffee house, who deals mightily in antique scandal; my disputant has laid him twenty pieces upon a point of history, to wit: that Cæsar never lay with Cato's sister, as is scandalously reported by some people. There are several of this sort of fellows in town, who wager themselves into

* "I have heard old cunning stagers
Say, fools for arguments lay wagers."

statesmen, historians, geographers, mathematicians, and every other art, when the persons with whom they talk have not wealth equal to their learning." In No. 521. a correspondent tells how he has made a fortune by wagers: "Whenever I heard any narration uttered with extraordinary vehemence, and grounded upon considerable authority, I was always ready to lay any wager it was not so. * * * * I had arrived at a particular skill in warming a man so far in his narration as to make him throw in a little of the marvelous, and then, if he has much fire, the next degree is the impossible. Now this is always the time for fixing the wager."

Brooke's coffee house in London was the great resort of betting men, and the betting-book of that establishment, still preserved, records many singular wagers. Horace Walpole gives accounts of several wagers in his time; for instance, Lord Cobham, on a wager of five guineas with Lord Nugent, spit in Lord Hervey's hat which he was holding in his hand; "a man dropped dead at White's door, and was carried in, and the club immediately made bets whether he was dead or not, and when they were going to bleed him, the wagerers for his death interposed and said it would affect the fairness of the bet." One Blake "betted 1,500*l.*, that a man could live twelve hours under water, hired a desperate fellow, sunk him in a ship by way of experiment, and both ship and man have not appeared since." Doubtless an interesting history might be written of gaming and wagers, but that is not our province. I will only add that the mania for betting, prevalent in Addison's and Walpole's day, in-

creased down to a period within the memory of men now living.

At common law wagers were generally valid, although not favored. This doctrine, through the good sense of judges and the increasing morality of communities, has been for a century growing more hedged about by restrictions and by statutory enactments. At law, wagers are now not recoverable, when the parties had no interest in the subject of the bet; where it tends to immorality or a breach of the peace, or the injury of third persons, or to the introduction of indecent evidence; nor where it tends to restrain the exercise of an office or privilege, or is against sound policy, etc. It may be instructive to look over some of the older decisions on the subject, and may disabuse some theologians and moralists of the idea that the world is a great deal worse than it used to be, in one respect at least.

One of the earliest cases is *Pope* v. *St. Leger* (Salk. 344). before Lord Holt, in 1693. At play at backgammon, one of the players stirred one of his men, but did not move it from the point, and the question was whether he was bound to play it? On this a wager of £100 was laid, and the determination referred to the groom porter; and now in an action, the question was on the statute against gaming, whether this was within the statute? And it was held this wager was not prohibited by the statute, for it was not on the *chance* of the play, but on the *right* of the play, which is a collateral matter. This case was cited as authority in a similar case a century later, but the court seemed to think that it had outlived its usefulness.

Earl of March v. *Pigot* (5 Burr. 2802), A. D. 1771, is one of the most charming cases in the books. It exhibits the filial affection of ingenuous British youth in a truly admirable light. "The cause was tried before Lord Mansfield. It was a contract made at Newmarket. The wager was originally proposed between young Mr. Pigot, the defendant, and young Mr. Codrington, to run their fathers (to use the phrase of that place), each against the other. Sir William Codrington, the father of Mr. Codrington, was then a little turned of fifty; Mr. Pigot's father was upward of seventy. Lord Ossory computed the chances, according to the above-mentioned ages of their respective fathers. Mr. Codrington thought the computation was made too much in his disfavor. Whereupon Lord March agreed to stand in his place, and reciprocal notes were accordingly given between the earl and Mr. Pigot." Young Pigot agreed to pay March 500 guineas if old Pigot died before Sir William Codrington, and March promised to pay young Pigot 1,600 guineas in case old Codrington did not survive old Pigot. No mention was made about the old fellows *then* being dead or alive. But the joke was that old Pigot was actually dead; he died at Shropshire at two o'clock in the morning of the same day on which his hopeful son made the humorous wager after dinner. The fact, however, was not known to any of the parties. Passionate grief rendered young Pigot momentarily forgetful of his honor, and he declined to pay the wager. "The objection was that the contract was void." For immorality and indecency, of course? Oh, no!

"It was without any consideration, for there was no possibility of the defendant's winning, his father being then actually dead, and *therefore* he ought not to lose." But the bet was held good, and no animadversion against its character was made by the great Lord Mansfield. And so the excellent young Pigot, besides being overwhelmed with grief at his sudden bereavement, had to pay his note. It was sneakingly mean and inconsiderate in the old man to die in this underhand way, and thus subject his son, the companion of young noblemen, to the mortification of having bet against a dead certainty. It was a great joke on him, and no doubt he had to pay many dozens of wine to his friends on the event. But it was what you might expect of old Pigot, for the record does not show that he was of noble blood, and so we infer he was plebeian, and knew no better. We cannot understand Lord Kenyon's remark in *Good* v. *Elliot*, that this wager was "somewhat indecorous," and are glad to know that this is the only reprimand to be found among the English judges of a transaction so admirable.

In *Jones* v. *Randall* (Cowper, 37), it was decided in 1774, that an action lies to recover money won upon a wager, "whether a decree of the court of chancery would be reversed or not on an appeal to the House of Lords," unless the motive be immoral. In arguing against the wager, Mr. Dunning made the following startling statements: "It is essential to the validity of a wager that the event be contingent. But the laws of this country are clear, evident and *certain;* all the judges know the laws, and knowing them, administer justice with uprightne

and integrity: The event, therefore, was certain." Lord Mansfield condescends to a little grave fun in his decision: "This contract is equal between the parties; they have each of them equal knowledge or equal ignorance; and it is concerning an event which, reasoning by the rules of *predestination*, is, to be sure, so far certain that it must be as it should afterward happen to be. But it is a future event equally uncertain to the same or of a different opinion with the chancellor; the presumption, if any, is rather against the person betting in opposition to the chancellor's judgment." "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort." His conclusion is that the transaction "contains nothing either immoral or contrary to justice." He admits that, if the present wager had been made with one of the judges, or with one of the lords, it would have been a bribe; and that, "if laid with the attorney or counsel in the cause, it would have been objectionable."

Judge Van Ness, of this State, once pronounced this "a strange decision," and Mansfield himself seemed afterward to think so, for in the argument of the subsequent case of *Da Costa* v. *Jones*, he interrupted counsel to say, "Never was a question more doubtful how it would be decided, till it was actually determined."

It was held in a more modern case, *Evans* v. *Jones* (5 M. & W. 77), that a wager as to the conviction or

acquittal of a prisoner on a criminal charge is void. One of the judges observes: "It is too late now to say that no wager can be enforced by law, but I think it would have been better if they had originally been left to the decision of the jockey club." It is never too late to mend, and it would be hard indeed if the bending of the legal twig made an inflexible tree.

The celebrated case of *Da Costa* v. *Jones* (Cowper, 729) was an action on a wager between the plaintiff and the defendant upon the sex of Monsieur Le Chevalier D'Eon. The subject of the wager was a man of singularly effeminate appearance, who was connected with the French embassy at London, in 1763. He had served with credit as a soldier. The question of his sex was deemed worthy of the attention of the French parliament, which decreed him to be a woman, and to wear feminine apparel, which he did for many years in Paris and London. Horace Walpole says of him: "She looked more feminine, as I remember her, in regimentals, than she does now. She is, at best, a hen-dragoon or a herculean hostess." And again, "Lord Mount-Edgcumbe said excellently, that 'Mademoiselle D'Eon is her own widow.'" Good Hannah More dined with him, and wrote: "She is extremely entertaining, has universal information, wit, vivacity and gayety. Something too much of the latter (I have heard) when she has taken a bottle or two of Burgundy; but this being a very sober party, she was kept entirely within the limits of decorum." The agreement in the above case was that the defendant, in consideration that the plaintiff would then and

there pay him seventy-five guineas, should pay the plaintiff three hundred pounds in case the chevalier should at any time prove to be a female. The case was tried before Lord Mansfield, in 1777, and the plaintiff had a verdict, which must have been founded on evidence of the chevalier's femininity. On motion in arrest Lord Mansfield said the case had "made a great noise all over Europe;" that he was "sorry that the nature of the action had not been more fully considered;" and that the witnesses "had not been told they might refuse to give evidence if they pleased:" He continues: "That two men, by laying a wager concerning a third person, might compel his physicians, relations and servants to disclose what they knew relative to the subject-matter of the wager would have been an alarming proposition;" and quite appropriately he adds: "the *bare* stating of it would have startled." He then supposes the case of a "wager upon a mark or defect in a woman's body. Will the court say they would suffer her chambermaid to be called, to give evidence upon such a question?" He considerately remarks, "a wager whether the next child shall be a boy or a girl hurts no one." His conclusions are that this action will not lie because it tends to indecent evidence, and to disturb the peace of the individual and of society.

In *Atherfold* v. *Beard* (2 T. R. 610), A. D. 1788, it was held that a wager respecting the future amount of any branch of the public revenue is illegal, because it leads to an improper discussion, and is contrary to sound policy. The wager was five guineas whether the Canterbury collection of the

duty on hops for the year 1786 would amount to more than the Canterbury collection for the preceding year. It was argued in favor of the wager that it did not appear that the parties were hop-growers, and consequently neither could be instrumental in diminishing the revenue on account of any bias arising from the wager; nor could the wager have deterred either party from growing hops, for the hops for that year were planted and in blossom. The argument that needed this answer, although made by Erskine and Garrow, seems queer logic, for if one had an interest in diminishing the revenue, the other had an interest in increasing it, and so the matter was equal. The court put their decision on the ground that it was an "impertinent wager," and tended to "*expose* to all the world the amount of the *public* revenue!" Buller put it on the ground that it was an "idle wager," and that no "wager between two persons not interested in the subject-matter is legal."

Good v. *Elliot* (3 T. R. 693), A. D. 1790, was a case on a wager, whether Susannah Tye had or had not, before a certain day, bought a wagon. A majority of the court held the wager binding. Buller dissented, and observed: "If the bet is founded on the private transactions, or the interest of a third person, I think it is void. * * * If it concern the person of another, no action can be maintained upon it. And therefore I am of opinion that a bet on a lady's age, or whether she has a mole on her face, is void. No third person has a right to make it a subject of discussion in a court of justice, whether she passes herself in the world as being

more in the bloom of youth than she really is, or whether what is apparent to every one who sees her is a mole or a wart; and yet these are circumstances which cannot, in a court of law, be stated as an injury; for if a man say that a young woman who passes for 23 years of age is 33, or that she has a wart in her face (which is considered a nasty thing), no action will lie for it. I will put one case more, which, if it do not appear too ludicrous, perhaps may be found to bear upon the present question. Suppose a bet were made whether a young lady squinted with her right eye or her left eye; shall it be the subject of sober inquiry in a court of justice how the organs of her eyes are formed, and which of them it is that looks directly to the object before her? Shall the parties in the action be permitted to say the inquiry is no injury to her, for everybody sees that she squints, and it makes no difference to her whether it be with one eye or the other? No. The answer is, you, the plaintiff and defendant, have no right, by an idle, wanton bet of yours, to bring her person, or even her name, in question." Who would suppose that this was the judge who held that a husband had a right to chastise his wife with a stick not bigger round than his thumb? The gallant judge, however, seems, satirically, as careful of Newmarket contracts as the court in *March* v. *Pigot*: "If a person of high rank were to sell a horse at Newmarket to a person just 21 years of age, for £5,000, whatever the laws of Newmarket may justify, it would not be a pleasant thing to have it discussed in a court of justice, whether the horse were worth more than £25."

In *Robson* v. *Hall* (Peake, N. P. 127), A. D. 1792, there was a wager that the plaintiff "did not find two geldings to trot 32 miles in two consecutive hours." The feat was accomplished by trotting one horse twelve miles, another four miles, and then the first horse twelve miles more. (How this made thirty-two miles is not explained.) It was insisted for the defendant that the meaning of the agreement was that each horse should trot sixteen miles, but Lord Kenyon thought not. He suited the plaintiff on this point but nonsuited him on another.

In 1808, in *Hartley* v. *Rice* (10 East, 20), it was held that a wager, whereby, in consideration that the plaintiff promised to pay the defendant fifty guineas in case he, the plaintiff, should be married within six years, the defendant promised to pay the plaintiff the like sum if the plaintiff should not be married within that time, was void as being in restraint of marriage, no circumstances being shown to render such restraint prudent and proper in the particular instance. The court, consisting of Ellenborough, Grose, Le Blanc and Bayley, were a marrying court, and would not listen to a man contracting to keep himself out of bliss for so short a period even as six years.

In *Hussey* v. *Crickitt* (3 Camp. 168), A. D. 1811, it was held that an action may be maintained upon a wager of a rump and dozen whether the defendant be older than the plaintiff. The parties were dining in Furnival's Inn Hall. The only doubt among the court was that entertained by Sir James Mansfield, whether he judicially knew the meaning

of a rump and dozen. The dinner cost £18. But it seems that evidence was resorted to for the purpose of explaining the meaning of the cabalistic phrase. And in *Bulling* v. *Frost* (1 Esp. Cas. 236), Lord Kenyon held an action maintainable to recover money lost at the game of all fours, the rules of which must have been proved and explained on the trial.

In *Gilbert* v. *Sykes* (16 East, 150), in 1812, it was held that a wager, by which the defendant received from the plaintiff one hundred guineas on the 31st of May, 1802, in consideration of paying the plaintiff a guinea a day as long as Napoleon Bonaparte, then first consul of the French republic, should live; which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void, on the grounds of immorality and impolicy. It appeared that the defendant paid his guinea daily from May 31st, 1802, to December 25th, 1804, but no longer. He evidently thought Christmas a good day to stop on. The plaintiff claimed £2,296. It was shown that the bet arose after dinner at the defendant's table, and evidence was adduced to show that it was not intended seriously, but that, although the plaintiff offered to cancel it, the defendant stuck to it out of a sense of honor. The jury found for the defendant. It was argued that the bet was impolitic, as giving the plaintiff an interest in the life of a foreign sovereign, who had become an enemy. Lord Ellenborough gave heed to this suggestion: "Then is not the interest created by this wager likely to induce more proximately mischievous consequences

to the public than the other instances which have been considered as having that tendency? The mischief is more to be regarded at a time when it has been announced by that enemy, in the preservation of whose life the plaintiff has thus created an interest to himself, year after year, that there is a large force collecting on the opposite coasts ready to be poured into this kingdom, and every Sunday the minds of the subjects are kept alive to the danger; and shall it be allowed to a subject to say, that in case of such an event happening as an invasion of the kingdom by the French ruler, the loss of 365 guineas a year depending on that life, would have no operation on his mind when opposed to the call of active duty toward his country; that the moral duties which bind man to man are in no hazard of being neglected, when put in competition with individual interest; that it is not an object to us to prevent even the suspicion, and to repel from us the malignant imputation that we countenance in any manner the idea of assassinating an enemy, and thereby guard against any attempt on his part to retaliate upon a life most dear to us all." Truly, this was a most immoral wager — binding the plaintiff not to kill Napoleon, when it became his duty to do so, and binding the defendant to take his life in order to end his obligation to pay! But the passage quoted from Lord Ellenborough's opinion affords striking judicial evidence of the panic which Napoleon's fictitious demonstrations of invasion had created in the kingdom of Great Britain. If the little corporal had really set foot on British soil, he would have had nothing to fear from his

lordship individually, for he was turned out of the awkward squad of the Lincoln Inn soldiery on account of incorrigible unfitness for military affairs.

Napoleon again came in court in *Phillips* v. *Ives* (1 Rawle, 36), A. D. 1828, in which it was held that a wager, whether or not Napoleon Bonaparte would, within a specified time, be removed or escape from St. Helena, was illegal and void. In the prevailing opinion the judge said: "I hold that no bet of any kind, about any human being, is recoverable in a court of justice." Two judges, however, dissented, holding that the subject was too far removed to be affected by the wager, either mentally or physically.

Bland v. *Collett* (4 Camp. 187), A. D. 1815, involves a Newmarket episode. The plaintiff, defendant, and a person of the name of Porter, having been at the Newmarket races, in October, the plaintiff one evening boasted of being acquainted with Lord Kensington, and having conversed with him on the turf at a former Newmarket meeting. Porter asserted that the plaintiff had never spoken to Lord Kensington in his life. A bet was talked of on the subject, but none was then laid. Next morning the parties againt met, when Porter asked: "What will you now lay that you conversed with Lord Kensington?" The plaintiff answered 80 guineas to 10." The money was accordingly deposited in the hands of the defendant, as a stakeholder. Upon which Porter exclaimed: "Now I have you; I have made inquiries, and the person you conversed with was Lord Kingston, not Lord Kensington." The plaintiff owned his mistake, but said he had been imposed on, and gave notice

to the defendant not to pay over his money. Held, a valid wager.

In *Ditchburn* v. *Goldsmith* (4 Camp. 152), 1815, a wager of £200 to £100 that Joanna Southcote would be delivered of a male child before a certain day, was held void. Joanna, it will be remembered, was an impostor who claimed that she was to become the mother of a new Messiah. It was strenuously urged by counsel, that the wager was unobjectionable on the score of injury to her feelings, she having announced that she was pregnant of a male child, although she pretended still to be a virgin; and besides she was dead at the time of the trial. But as soon as it came out in evidence that she was unmarried, Chief Justice Gibbs stopped the trial and dismissed the cause.

Campbell v. *Richardson* (10 Johns.) 406, 1813, was a case where the defendant had set up a mark to be shot at for 25 cents a shot, and offered the plaintiff, if he hit it, to pay him $20. The plaintiff hit the mark, and it was held that this action to recover the $20 was not amiss. This was, as the court said, an innocent wager, certainly, if there ever was one. No doubt Lord Ellenborough would have sustained it, on the ground that it was a praiseworthy method of training up marksmen to resist the incursion of Napoleon, and Lord Eldon, I dare say, would have held the wager innocent, unbiased by any feeling of envy, although he was a notoriously bad shot himself, and was never known to kill any thing but time, as his brother, Lord Stowell, said.

Fisher v. *Waltham* (1 Dav. & M.) was a case of a

wager by the defendant that he would not sustain his examination as an attorney and be admitted to practice. Although he passed, yet this was held void as a "bubble bet," that is, one which the defendant had the power to win at his pleasure. This may be good law in England, but no one could be rejected here if he cried ever so hard.

Although courts are sometimes in doubt upon wagers as to others, they never have had any doubts when the wager concerned themselves. They are as sensitive as Judge Buller's lady with the mole on her face, as to any inquiry by way of wager into the extent of their knowledge. So Lord Ellenborough, in 1810, in *Henkin* v. *Guerss* (12 East, 217), an action on a wager as to the practice of the court upon a given point, held that he would not hold any thing, not even hold still to hear the case. He was not bound to "answer impertinent questions." It was an "extremely impudent attempt to compel the court to give an opinion upon an abstract question of law, not arising out of pre-existing circumstances in which the parties had an interest." No doubt the parties thought themselves lucky to escape from his paws without being transported for contempt.

Even more violent on another question was Lord Loughborough, in *Brown* v. *Leeson* (2 H. Bl. 43), in 1797. Knowing his lordship to be a constant frequenter of Brooke's and White's, and intimately acquainted with the mysteries of gambling, the parties were doubtless not prepared for the following roar, but probably depended on an exercise of the knowledge intimated in his lordship's last sen-

tence: "Do not swear the jury in this case, but let it be struck out of the paper. I will not try it. The administration of justice is insulted by the proposal that I should try it. To my astonishment, I find that the action is brought on a wager as to the mode of playing an illegal, disreputable and mischievous game called 'hazard;' whether, allowing seven to be the main, and eleven to be a nick to seven, there are more ways than six of nicking seven on the dice? Courts of justice are constituted to try rights and redress injuries, not to solve the problems of the gamesters. The gentlemen of the jury and I may have heard of 'hazard' as a mode of dicing by which sharpers live, and young men of family and fortune are ruined; but what do any of us know of 'seven being the main,' or 'eleven being the nick to seven?' Do we come here to be instructed in this lore, and are the unusual crowds (drawn hither, I suppose, by the novelty of the expected entertainment) to take a lesson with us in these unholy mysteries, which they are to practice in the evening in the low gaming houses in St. James street, pithily called by a name which should inspire a salutary terror of entering them? Again, I say, let the cause be struck out of the paper. Move the court, if you please, that it may be restored, and if my brethern think that I do wrong in the course that I now take. I hope that one of them will officiate for me here, and save me from the degradation of trying whether there be more than six ways of nicking seven on the dice, allowing seven to be the main and eleven to be a nick to seven'—*a question, after*

all, admitting of no doubt, and capable of mathematical demonstration." The court, on review, sustained this decision. They could hardly do otherwise, for Alexander was the only one of them who knew any thing of the subject, and he, as we have seen, "would not tell." Counsel, in arguing this case, cited *Pope* v. *St. Leger*, but it received no credit.

THE ANIMAL KINGDON IN COURT.

ONE of man's proudest boasts is his assumed superiority to, and sovereignty over, the brute creation. In a state of innocence, we are informed by a reliable authority, he had dominion given to him over the beasts. His superiority was early lost, in a great degree — perhaps as one of the sad consequences of the fall. In a state of nature, even since the fall, his sovereignty has been occasionally, in some measure, restored; probably as a reward for his desertion of the impurities of the world and of society. Thus, in Cowper — a recognized legal authority — Alexander Selkirk, cast away on a desert island, says to himself:

> "I'm monarch of all I survey,
> My right there is none to dispute.
> From the center all round to the sea,
> I'm lord of the fowl and the brute."

This was not a mere empty boast, for he says later, in speaking of the docility with which the animal race yielded to his authority:

> "Their tameness is shocking to me."

How different in a state of so-called civilization? We pay taxes on our dogs, and they give us hydrophobia; we feed our horses dainty oats, and install them in luxurious stables, and they kick us or run away with us; we transport the bee from the rough

forest tree to a neat and comfortable hive, and he, not caring a straw, stings us; we pay several thousand dollars for a fine ram and he butts us, or for a blooded bull, and he lifts us, unwilling, over the fence, when we would go our own gait. How feelingly does the philosopher Launce describe what he undergoes for his ungrateful cur: "I have sat in the stocks for puddings he hath stolen, otherwise he had been executed; I have stood on the pillory for geese he hath killed, otherwise he had suffered for't."

But our damages are not confined to our own persons. We are forced to pay for the hurt that animals cause others. Exactly to what extent mankind are legally responsible to each other for the pranks of the animal kingdom, has a good deal puzzled the courts to determine, but the rules arrived at have been well summed up by Judge Selden, in *Earl* v. *Van Alstyne*, the quotation of which, as possibly a piece of superfluous seriousness, I now apologize for, before proceeding to the normal levity of my subject. The learned judge says the gist of the decision is: "1. That one who keeps or owns an animal of any kind, becomes liable for any injury the animal may do, only on the ground of some actual or presumed neglect on his part. 2. That it is essential to the proof of neglect, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. 3. That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed."

As we have seen in "Law and Lawyers in Literature," dogs have been a prominent subject of mock-trials among authors. Aristophanes and Racine have condescended to them. And in real life they have acted an important part as the cause of considerable litigation. "Dogs" forms a distinct head in the digest. Grave judges have said and decided kind things about them.

Eldon's dog Pincher is famous, and his master made a testamentary provision for him. He was introduced into several portraits of his lordship, who said: "Poor fellow, he has a right to be painted with me; for when my man Smith took him the other day to a law bookseller's, where there were several lawyers assembled, they all received him with great respect, and the master of the shop exclaimed: 'How very like he is to *old Eldon*, particularly when he wore a wig;' but, indeed, many people say he is the better looking chap of the two."

Erskine had a favorite dog that always attended him in consultation, and apparently gave more heed than his master. It is true that on this side of the Atlantic it has been mooted whether dogs are property; but in Great Britain, as I infer from a *cursory* view, they have always been held capable of being stolen as well as of stealing. What has made the English judges so tender toward dogs I cannot guess, unless it may be that they themselves so strongly resemble poodles, when they get their wigs on. They have held that to justify the killing of a dog for pursuing fowl, he must be caught and slain *in flagrante delicto*. Dogs are protected, too, against deceit and undue influence. Thus in

Townsend v. *Wathen* (9 East, 277), the defendant was possessed of a certain wood, situate near the premises of the plaintiff, and wrongfully intending, etc., to destroy the plaintiff's dogs, had placed traps in and about the wood, and near to certain public highways and footways, and near to the grounds of the plaintiff, and had placed pieces of flesh and strong-smelling things in and about the said traps, and had procured to be trailed around about the traps similar attractive scents, and had continued the same, etc.; the plaintiff's dogs were thus often caught, and there was evidence that the defendant had offered his servant 1*s.* for every dog killed. It was said "*Per Cur.*"—I don't understand that this really means "by a dog," although it would seem not unreasonable—that this could not be tolerated. In another action, of damages for stabbing a dog, which occurred in a dog tussle, the plea was held bad on demurrer, because it did not allege that the stabbing was necessary to part the dogs. And again, where the plea attempted to justify the killing of a dog because he was running after hares, it was held bad, because it did not aver that the dog belonged to an unqualified person, etc. *Vere* v. *Lord Cawder* (11 East, 568). Chief Justice Holt seems to be an exception to the rest of the English judges on this point, for he held, in *Smith* v. *Pelah* (2 Str. 1264), that if one trod on a dog's toes, and the dog resented it, an action would lie against the owner; but he put it on the ground that the dog had once bit a man, and the owner had neglected his duty of hanging the offender. Two things are inferable from this: first, that Chief

Justice Holt was not troubled with corns; and second, that some dog had, at some time, "got a holt of him," as the countrymen phrase it. We know that Lord Camden was very tender of inflicting the punishment of the stocks, because he once sat in them himself, by way of experiment, and his friend forgot him and left him locked in for ten hours. So, too, Judge Holt, in his youth, which was a wild one, may have had a dose of dog's tooth, which left an equally deep-seated impression.

On the other hand, in *Stansfeld* v. *Bolling* (22 L. T. Rep. [N. S.] 799, Ex.), it was held where a shopkeeper had spread poison on bread and cheese, and placed them under his counter, for the purpose of destroying rats, and the plaintiff's dog came behind the counter and ate the poison, and died in consequence, that the defendant was not liable.

In America, dogs have not been treated with the like respect. *Wiley* v. *Slater* (22 Barb. 506) was an action to recover damages for injuries inflicted by the defendant's dog on the plaintiff's dog. Judge W. F. Allen, who for some years controlled the finances of this State, could not control his sense of the ridiculous on this occasion, and held forth as follows: "This is the first time I have been called on to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. I have had occasion to preside upon the trial of actions for assaults and batteries originating in affrays in which the masters of dogs have borne a conspicuous part, and acquitted themselves in a manner which might well have aroused the envy of their canine dependents.

The branch of the law therefore applicable to direct conflicts and collisions between dog and dog is entirely new to me, and this case opens up to me an entire new field of investigation. I am constrained to admit total ignorance of the code duello among dogs, or what constitutes a just cause of offense, and justifies a resort to the *ultima ratio regem*"—(*regum*, your honor means, and very significant is the correct termination in this connection)—"a resort to arms, or rather to teeth, for redress; whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette, entitle the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not, and am glad to know that no nice question upon the conduct of the conflict, on the part of the principal actors, arises in this case. It is not claimed upon either side that the struggle was not, in all respects, dog-like and fair. Indeed, I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate and control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they entered into and became a part of the domestic institution, to settle and avenge, in their own way, all individual wrongs and insults, without regard to what Blackstone or any other jurist might write, speak or think of the 'rights of persons,' or 'rights of things.' I have been a firm believer with the poet in the iustruct-

ive"—(intuitive, Mr. Reporter, I guess)—"if not semi-divine right of dogs to fight; and with him would say:

> 'Let dogs delight to bark and bite,
> For God hath made them so;
> Let bears and lions growl and fight,
> For 'tis their nature to.'

"It is possible that, had the owners of both dogs been present, the belligerents would have been changed, and the familiar questions growing out of *son assault demesne*, and *molliter manus imposuit*, would have been presented, but no such questions are made here.

"The defense is not rested upon the principle of self-defense, or defense of the possession of the master of the victorious dog. Had this defense been interposed, a serious and novel question would have arisen, as to the liability of the offending dog for excess of force, and whether he would be held to the same rules which are applied to human beings in like cases offending; whether he would be held strictly to the proof of the necessity and reasonableness of all the force exerted, under the plea that in defense of his carcase, or the premises committed to his watch and care, 'he did necessarily a little bite, scratch, wound, tear, devour and kill the plaintiff's dog, doing no unnecessary damage to the body or hide of the said dog.'"

Then follow some *obiter dicta* about the *facts* of the case, and the judge winds up in this entertaining strain: "It is very proper to invest dogs with some discretion while upon their master's premises, in regard to other dogs, while it is palpably wrong

to allow a man to keep a dog who may or will, under any circumstances, of his own volition, attack a human being. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature of the particular temper and mood, at the time, of the dog visited. The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land.

"The evidence is slight that the dog died in consequence of this fight. I should infer from the evidence, that he continued his annoying visitations until some one, who did not own a white dog with black spots on his head, made use of a shot-gun or Sharpe's rifle, or some other (*sic*) substitute to abate the nuisance. But as this question is left in doubt by the evidence, the judgment of the justice is conclusive as to the cause of the death. I can see, however, no just grounds for the judgment. It can only be supported on the broad ground that when two dogs fight, and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog; and I know of no such rule. The owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor, and this rule would ordinarily be a full equivalent for the loss; and with that, unless the evidence differ materially from that in this case, he should be content."

The judge evidently did not own a dog, or he would not have used those heartless expressions about a dog's value.

In walking through a park and observing the signs, "All dogs found on these grounds without their owners, will be shot," a friend of mine exclaimed, "That's a hard case for dogs that can't read." This humane idea was carried into practice, in favor of the human species, at least, in *Sarch* v. *Blackburn* (4 C. and P. 297), in which it was held that one who entered an inner inclosure where a fierce dog was confined, and was bitten, could maintain his action for damages, although "beware of the dog" was posted up in a conspicuous place, it being also shown that he could not read. This is one of the few instances in which "ignorance is bliss." But humanity would suggest in such cases the exhibition of some pictorial warning to trespassers; for instance, a sign representing a man, with a dog seizing him by the seat of his trousers, would be quite unmistakable, and save the time of the courts. Nothing, then, short of physical blindness on the part of the trespasser, or judicial blindness on the part of the court, would effect a recovery from the dog's owner, although there could be no objection to a recovery, by the help of nature, from the dog.

A singular dog case arose at the Rensselaer circuit a few years ago. The dog had jumped up at and thrown down and bruised a lad in the street. It was proved that the dog's master had taught him to leap up and take off people's hats with his teeth. The jury inferred that the animal was prac-

ticing this lesson on the boy, and recognizing no reason why the master should set himself up as a censor of the public manners, and dictate to the plaintiff when to uncover, said that the plaintiff might recover.

In *Loomis* v. *Terry* (17 Wend. 496), it appeared that the plaintiff's son, aged 16, and a number of other boys, were hunting in the woods of the defendant, on a *Sunday*, where the plaintiff's son was attacked by a hound, which sprang upon him, assisted by a slut, and brought him to the ground. It was shown that the slut had puppies near by, which fact tended to make her cross. This, however, did not produce such an effect on the court as the presentation of the puppies did in *Les Plaideurs*. It appeared also that the hound had previously bitten people, to the knowledge of the defendant. In spite of the fact that the boy was a trespasser, and that, too, on the Lord's day, and had excited the maternal apprehensions of the lady dog, a judgment of $15 was sustained. It is to be feared that the sympathetic mind of Judge Cowen was affected by the proof that the defendant, quite naturally, "had wished his dogs had eaten the boy up." His honor seems to lay stress on the assumed fact that "a fierce dog is kept without semblance of necessity." The case does not disclose, but the natural inference is, that the hound was the father of the aforesaid puppies, and the spouse of the aforesaid lady dog. This being so, was he not a "necessity," and was he not acting in the line of his duty and of his honor, within the recent cases of infringements on domestic rights? Judge Cowen lived too early to

know the modern refinements on this subject. I must confess, my sympathies are all on the other side in this particular case. If that young rascal had been at Sunday-school, learning his catechism, as he ought, he would, at least, never have been troubled by the dogmas of the canine order.

If there is any case in the books, which, more than another, deserves to be printed in letters of gold, it is the case of *Brill* v. *Flagler* (23 Wend. 354). In this righteous decision Judge Nelson laid it down as the law, that the inhabitant of a dwelling-house may lawfully kill the dog of another, where such dog is in the habit of haunting his house, and by barking and howling, by day and by night, disturbs the peace and quiet of his family, if the dog cannot be otherwise prevented from annoying them. It is no wonder that the author of these words, so full of somniferous balm to weary watchers, rose to a seat on the federal bench. "It would be mockery," said this excellent judge, "to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case." The judge speaks feelingly. I dare say the dogs at Cooperstown had been nocturnally vociferous about those days. As to the "action" spoken of, I suggest that it would be an admirable exercise for some of the devotees of the common-law system of pleading, to draft a declaration in an action on the case, on the facts above stated, as a precedent for the young gentlemen in their offices.

On this subject of pleading, it may be observed, it was once held, in *Jenkins* v. *Turner* (1 Ld. Raym. 109), that in an action for keeping a boar accus-

tomed to bite *animalia*, the *animalia* was sufficiently certain after verdict. And *whelps* had been adjudged good after verdict (3 Lev. 336). It is gratifying to learn that they are good for any thing at any time.

But this most striking case of judicial nervousness and rancor on the subject of dogs is *Brown* v. *Carpenter* (26 Vt. 638), in which the chief-justice, Redfield, says: "If any animal should be regarded as the common terror of all peaceable and quiet-loving citizens, it is such a dog;" that is "a ferocious and overgrown dog," "and the owner who persists in keeping such an animal, without effectually and physically restraining him, so that he can do no one harm, ought not to complain of his destruction. He ought to be grateful to escape so; for he is undoubtedly liable to, and justly deserves, exemplary punishment, under the criminal laws of the State, and if one injured or liable to injury chooses to right himself by abating the nuisance only, *he deserves to be regarded as a public benefactor.*"

So little respect has the dog, an object of tenderness, as we have seen, in the English courts, received in the American courts, that it has been held an indictable offense to say of a human being that he has a dogged disposition. Thus, in *Gilbert* v. *The People* (1 Denio, 41), the indictment was for a libel contained in a declaration in a justice's court, which stated that the plaintiff "had a number of sheep in the county of Columbia, and that said defendant did, in the year 1843, *if ever*, bite and worry fifty of plaintiff's sheep, after the said defend-

bees had never done such a thing before, the defendant was absolved. What would happen if they should do such a thing again was, of course, not considered, but after all suggests a curious legal inquiry, pondering which, the defendant might well say with Hamlet: "To be, or not to be, that is the question." If these useful little creatures could have been set, some years ago, at the horses on which Mr. James, the novelist, was forever mounting his "two travelers," they would have merited the praise of a modern Aristarchus, and have inspired a new Watts.

In *Gillett* v. *Mason* (7 Johns. 16), it was said that bees are *feræ naturæ*, but when hived and reclaimed, a qualified property may be acquired in them. But this property must always remain a qualified one, because they are such riches as "take to themselves wings."

"Seeing the elephant" is regarded, in modern times, as an expensive and undesirable business. The phrase probably derives its origin from the Punic wars, in which the elephants of the Carthaginians carried terror and dismay into the Roman hosts, both man and horse being unaccustomed to the sight of these animals. It is singular that the reporter, in writing the syllabus of *Scribner* v. *Kelly* (38 Barb. 14), did not make use of this phrase, which would have expressed the gist of the narration of facts. This was an action to recover damages for an injury caused by the fright of the plaintiff's horse at the mere sight of an elephant of the defendant, in traveling on the highway. No negligence on the part of the defendant, in the care of the

elephant, was shown, and it was held that the action would not lie. "To render the defendant liable," said the court, "for the damage that accrued, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but, also, that the defendant knew or had notice of it; for if it is conceded that the elephant is of a savage and ferocious nature, it does not necessarily follow that his appearance inspires horses with terror." The plaintiff's counsel ought to have had a volume of Plutarch at hand to supply this defect in proof, and to have cited to the court the example of Pyrrhus, who tried to scare Fabricius with the sudden appearance of an elephant. The court may be right in its law, but it seems to me, as Thurlow said of Eldon, that they gave some very bad reasons for it. For instance: "*Non constat* that any other moving object of equal size, and differing in appearance from such as he was accustomed to see, might not have inspired him with similar terror." Now if a railroad train runs over a man and kills him, is it any answer to say that a horse and wagon might have served him in the same way? But again: "The injury which resulted from his fright is more fairly attributable to a lack of ordinary courage and discipline in himself than to the fact that the object which he saw was an elephant." Now suppose the plaintiff in *Brill* v. *Flagler* had set up that the defendant's inability to sleep at night was more fairly attributable to his constitutional nervousness than to the howling of the defendant's dog, would that have been deemed a good reason for making the defendant

pay for the dog? On the whole, it would seem that this opinion, although entitled, as the decision of a general term, to elephantine weight, is not characterized by elephantine sagacity.

Bulls are frequently seen in court. I do not now refer to those bulls that counsel make, but to the bucolic fathers of the herd. The former usually come about because counsel have not read enough; the mischiefs of the latter are often due to having too much red. For instance, in *Hudson* v. *Roberts* (20 L. J. Exch. 299), the plaintiff, while walking along a public street, wearing a red handkerchief, was attacked and injured by the defendant's bull, which was being driven along the street. The defendant stated, after the accident, that the red handkerchief was the cause of the injury, for that he knew *the* bull would run at any thing red. He also stated, on another occasion, that he knew a bull would run at any thing red. *Held*, that his knowledge of the *article* was definite enough to make him liable in this case. Baron Alderson humanely remarked: "A man must not take a lion through the public streets, merely because he may not know that the lion has actually devoured a man before."

An important leading case is *Blackman* v. *Simmons* (3 C. and P. 138), which was an action for injuries sustained by the plaintiff at the horns of defendant's bull. There were some circumstances of mitigation for the bull's misconduct. The plaintiff was driving a cow with a stick. This gallant but inconsiderate bull, excited by the spectacle of the indignity offered to one of his own kine, rushed at the plaintiff, who hit him with the stick. Then,

of course, the bull, as he lawfully might, *molliter cornua imposuit*, and simply broke two of his ribs. Unfortunately for the bull's owner, who, up to this point, undoubtedly had the court with him, it was proved, that when he purchased the bull, he was warned that he was vicious, and had answered that this was no objection — he would "turn it into a mead where he was annoyed by people fishing;" and that he kept him insecurely hoppled. The judge — not Buller, strange to say, but Best — mildly characterized this conduct as "wicked," and said this was no way to abate the nuisance complained of. If trespassers came to hook his bull-heads and "horn-pouts," still he was not justified in setting his bull to hook *them*. The verdict for the plaintiff was sustained.

Rams have also been in court. It was held in *Jackson and Wife* v. *Smithson* (15 M. and W. 563), in support of a verdict for the plaintiffs, that the declaration which stated that the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt and injure mankind, etc., was not defective in not stating that he negligently kept the ram. The negligence is presumed. From the ramifications of *Oakes and Wife* v. *Spaulding and Oakes* (1868, 7 Am. Law Reg. 551, in Vermont), the principle is deduced that the owner is liable for injuries done by an animal which is known to be fierce or dangerous, though it does not belong to a class *feræ naturæ*. This action was brought to recover damages for an injury done to Mrs. Oakes by a ram, which was jointly owned by the defendants, both of

whom had been for a considerable time "aware that the ram had an unusual propensity to butt, and had on several previous occasions attacked and butted persons." Whether preof was offered that this ram had butted persons behind, as well as before, does not appear. The defendant Oakes, who may have been related to the plaintiff, husband Oakes, did not defend. Poor Spaulding was caught in a dilemma, of which he was at liberty to take either horn, for the defendants were held to be jointly liable. There was a verdict for $1,500. The case does not disclose the nature of the injuries, nor from what quarter this ill-bred animal assaulted Mrs. Oakes, but we infer that from the force of circumstances, she fell "butter-side up." But was she not imprudent in trusting herself in the field with the ram? She ought to have remembered how the walls of Jericho went down at the mere blast of ram's horns, and the story of the golden fleece, and measured her chances against so potent and reckless an animal as this assault-and-battering-ram.

Last, but not least singular, in this curious list is the monkey. *May* v. *Burdett* (9 A. and E. 101) was an action to recover damages for an injury to the plaintiff by the bite of a monkey. There was a recovery. The court took it for granted that the animal was *feræ naturæ*. How they could do this, when the animal in question is so nearly like a human being, is not easy to discover. Who knows but that their lordships themselves, in some former state of existence had worn tails? Lord Monboddo thought mankind a sort of superior ape, in whom civilization had abraded and erased the caudal mem-

ber. It is impossible to decide that he is wrong, and in some future existence, when the brutes have their rights in turn, as the horses among the Houhnhnms, these arrogant English judges may find themselves *docked*, in literal earnest, and their victims holding possession of the judicial bench in fee tail.*

Since writing the above my attention has been called to an article in the London *Law Times* on "Injuries from Domestic Animals," in which the writer complains of the absurdity of the rule exempting the owner of a domestic animal from liability for damage inflicted by such animal, unless he is proved to have known that the animal was of a vicious or mischievous disposition. He winds up in a strain suited to my purposes and views: "Not improbably, however, we may have to wait until some of our legislators, being bitten by dogs or gored by bulls which had previously borne a most unimpeachable character for mildness and general amiability, find out, by experience, that the existing state of the law has its inconveniences. We scarcely think that the contemplation of the previous virtues, however exemplary they may have been, of the animal which has injured them, will at all convince them that the law which enables them to escape scot free is the perfection of reason." One in this State, however, finds it difficult to understand his apparent tenderness of the Legislature. That which he seems to regard as a misfortune would here be deemed a boon.

* The above was written before the appearance of Mr. Darwin's new book, in which that learned and ingenious gentleman demonstrates the correctness of these conjectures.

NEGLIGENCE.

In this busy world men seldom stop to reflect on the multitude of dangers by which they are surrounded. We walk through perils thick as grass-blades. Most of these are the result of the negligence of our fellow-men. Very few are inevitable. We are accustomed to regard war as the state of greatest insecurity, but peace hath her perils no less profound than war. The prescriptive right of death on the battlefield is but little stronger than in an apothecary's shop, with a careless clerk. One may have his head taken off by a cannon ball in battle, but he is also liable to have it cracked by a brick from a chimney. One may be rendered *hors du combat* by a charge of cavalry, but in turning a street corner he is not secure from annihilation by a runaway steed. A bayonet thrust in the abdomen is not a pleasant thing, but so is not impalement on a cane or umbrella in a crowd. A bullet in your head is decidedly confusing, but so is your neighbor's vicious bull let in your front-door yard.

Man is continually striving to evade responsibility for his passive "inhumanity to man." The cry, "Am I my brother's keeper?" is echoed after six thousand years, in every suit for damages occurring through negligence. The law, in its fundamental maxims, recognizes our duty of care for one another. It concedes the right of property only on

the condition of care toward others — *sic utere tuo ut non alienum lædas.* Being thus bound to some degree of consideration of the welfare of others, man invents various ingenious theories to lessen the degree, and so we have the doctrines of contributory negligence and imputed negligence. Thus arose the struggle that has been going on for years in the courts of New York, to make negligence a question of law. One judge in England, in a recent case, doubted whether actions for negligence ought to be favored, and whether a traveler, as a member of society, ought not to bear his breaks and bruises uncomplainingly, as part of the unavoidable ills that society is heir to. My own impression is that every man ought to be left to his own tastes on this point. If the English judge finds in such considerations a salve for his broken bones, and the wherewithal to pay his surgeon, let him be indulged like any other harmless maniac. A learned friend of mine, who approves of capital punishment, says that he would advise that in capital trials, one of the inquiries should be, what were the views of the deceased on the subject of capital punishment, and that the punishment of the criminal be adapted to the opinions of his victim. Would not this be a good idea, in case of death produced by negligence? Let the judge's surviving relatives stand or fall by their decedent's notions. But it is too much to expect that weak human nature should rise at once to the exalted plane of his lordship's philanthropy.

It must be remembered, too, that the common law had a nice little dogma — *actio personalis moritur cum persona* — a personal action dies with the

person. So, if through the negligence of another, one was almost killed, he might recover damages; but if he was quite killed, no right of action survived to his relatives. Dead men tell no tales, and warrant no lawsuits. It is true that statutes have been enacted in many communities, correcting this defect; but as if to encourage murder, the right to recover has been, in a majority of instances, limited to some specific sum, much lower than would ordinarily be awarded for injuries not mortal.

The doctrine of negligence has caused a good deal of oscillation in the scales of justice, and very strange cases have come before the courts. Some of these are not unfamiliar, but it may serve to amuse a leisure moment to collect them, and refresh our memories in their oddities.

Scott v. *Shepherd* (2 W. Bl. 892) is the leading case on this subject. The defendant threw a lighted squib, or serpent, made of gunpowder, into the market-house, where a large concourse of people were assembled. It fell on the standing of one Yates, who sold gingerbread. One Willis, to prevent injury to himself and the wares of Yates, took it up instantly and threw it across the market-house. It fell upon the standing of one Ryall, who sold the same sort of wares; he, in like manner and with a similar intent, threw it to another part of the market-house, when it struck the plaintiff in the face, and bursting, put out one of his eyes. The plaintiff recovered damages. The main discussion was as to the form of the action. The conduct of Willis and Ryall was declared to be necessary in self-preservation, and for the protection of their

goods. Justice Gould observed that "the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face;" and Justice Nares, apparently innocent of an intentional pun, approved this idea and quoted the maxim, "*Qui facit per alium, facit per se.*" Whether the same doctrine would prevail in case of a libelous and inflammatory "squib," copied from one newspaper into another, was not considered, but is an interesting question. And so the report of this squib has resounded for a hundred years, and if it be considered as a "serpent," it has, like its prototype in Eden, laid the foundation of a great deal of strife and litigation, and its trail is yet to be seen in the courts.

Guille v. *Swan* (19 Johns. 381) is a famous case. Mr. Guille was a person whose thoughts and wishes carried him above the earth. He longed for something higher and better than worldly things. He was an æronaut. He made a voluntary ascent in the vicinity of Swan's garden, and an unwilling descent into the same. In his peril he called aloud to the pursuing crowd to help him. Meanwhile he was being dragged along in the balloon, and causing some slight damage to Mr. Swan's garden sauce. The crowd, consisting of some two hundred good Samaritans, broke through Swan's fences and threw his vegetable and flowers into great disorder. Now, it was lawful for Mr. Guille to ascend. It was lawful for the crowd to follow, gaze, and admire, for the balloonist to call on them in his extremity, and for them to rush to his rescue. But Mr. Guille had to pay for Swan's garden sauce. It was unquestiona-

bly very selfish and narrow-minded for Swan to insist on indemnity, but he took a worldly view of the affair. He had no interest in the sublime problem of ærial navigation; he had no individual friendship for the æronaut, he had no general care for the crowd; all he knew was that his radishes and other esculent roots had been spoiled, and he wanted his pay, and he got it. So mean is human nature; but we have to deal with it as we find it.

It seems rather hard that one must be answerable for the vegetable and floral consequences of human curiosity, and for the officiousness of two hundred friends, when half a dozen would have answered every purpose. If science has to struggle against such things it is to be feared that the navigation of the air will remain an unsolved problem. If garden shoots are to be preferred to parachutes, man must be content to crawl along the potato-and-radish-bearing earth at the snail's-pace of sixty miles an hour. This idea of the consequences of curiosity troubles us. If this is the law, then Mr. Barnum, in transporting his fat woman or Chinese giant about the country, might be made to answer for the safety of the bridges broken down by the crowds assembled to gaze at those unrivaled monstrosities.

In *Vandenburgh* v. *Truax* (1 Denio, 464), it was held that where the defendant, having had a quarrel with a boy in a street in a city, took up a pick-ax and followed him into the store of his employer, the plaintiff, whither he fled, and in endeavoring to keep out of defendant's reach, the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and

was wasted, the defendant was liable to the plaintiff for the damage. The action of the boy was reasonable, for from the nature of the defendant's weapon, it was evident that he intended to pick a quarrel with him. The injury of the plaintiff was not the necessary consequence of the defendant's act, but the act was of such a nature that it might naturally result in an injury to a third person. If the boy ran, the wine might run, and it is axiomatic to say that if Mr. Truax set in motion a pick-ax, he must abide the consequences, direct and indirect. It must not be supposed, however, that the defendant would have been liable for any injuries beyond those immediately connected with the occurrence. If the wine had leaked through upon the premises of one living under this store, for instance, he would not have been answerable for that damage. Any different doctrine would involve a possible train of consequences similar to those in the nursery legend of the old woman and her pig.

In *Bush* v. *Brainard* (1 Cowen, 78) it was decided that an action will not lie for carelessly leaving maple syrup in one's uninclosed wood, whereby the plaintiff's cow, being suffered to run at large, and having strayed there, is killed in drinking it. This was based on the ground that the cow had no right there. The defendant in this action, on the other hand, could not have maintained an action against the owner of the cow for the loss of his syrup, because, as the court said, "he was guilty of gross negligence in leaving his syrup where cattle running at large in the woods might have access to it." The plaintiff's case seems to have been fatally defect-

ive in proof. There was no evidence to show that it was the disposition of cows to drink maple syrup, or that such indulgence was apt to be fatal, nor that the defendant had actual or presumed knowledge or notice of such disposition or result. Leaving out of view the question of trespass, the plaintiff ought to have failed through his own weakness.

Cole v. *Fisher* (11 Mass. 136) was an action of trespass, *vi et armis*. The "arms" was a gun, which the defendant discharged, whereby the plaintiff's horse was frightened and ran away with his chaise, breaking it. The case came before the court on an agreed statement of facts, viz.: the defendant, after washing out two guns, went to the door of his shop, and, standing there, discharged one of the guns for the purpose of drying it, the shop door being a rod distant from the highway. The plaintiff's horse was standing harnessed in a chaise on the opposite side of the highway. Being frightened by the discharge, he broke the fastening and ran away, injuring the vehicle. The horse being unharnessed and put into a pasture in the defendant's neighborhood, the latter discharged another gun, for the like purpose of drying it. Upon this statement the opinion of the court was demanded. It was not shown that the defendant knew of the vicinity of the horse, and consequently he could not foresee that the horse would go off if his gun did. The pertinence of the second firing is a profound mystery, unless it may be argued that it tended to discharge the defendant. Possibly it was hoped that on the homœopathic principle of *similia similibus curantur* this last act would

restore the vehicle to a sound condition. This principle of physic proved effectual in the case of the wise man who jumped into the briar-bush. The court gave judgment for the plaintiff, and improved the opportunity to descant upon the impropriety of discharging fire-arms, under nearly every conceivable state of circumstances except those agreed upon as the facts in this case.

Lehman v. *City of Brooklyn* (29 Barb. 234) is a warning to mothers of young children. There was a well in one of the public streets of Brooklyn, level with the grade of the sidewalk, and usually closed with a wooden cover, having a square opening in the center, which was also covered with a lid on leathern hinges. A child four years old was found dead in the well, within half an hour after his leaving home. In this action, by the child's administrator, it was held that, considering the tender years of the child and the nature of the accident, the plaintiff was bound to show how the occurrence came about, and to explain how the child came to the well, and whether it was closed or not when he came there. For aught that appeared, his mother may have thrown him there, or he may have rashly importunate gone to his death, like Saxe's *Briefless Barrister,* who

> —— "espied a deep hole in the ground,
> And sighed to himself, it is well."

Consequently the recovery was held not maintainable. Whether the truth lay at the bottom of that particular well, we have no information, for this is the last of the case in the books, and we are in the dark whether Lehman brought appeal, in-

voked the aid of the court in a new trial, or was squeezed dry on the first. The chagrin of the plaintiff's attorney must have been materially mitigated by Judge Brown's remarking, in the opinion: "This action was most indifferently and inefficiently tried, for the examinations failed to bring out the facts upon which its determination must ultimately depend."

Castles v. *Duryea* (32 Barb. 480) is a singular case. The famous Seventh regiment New York militia, in July, 1855, under official orders, were encamped at Kingston, the defendant being in command as colonel. The plaintiff visited the camp ground with her infant child, and was sitting with other spectators at a place appointed for them by the officers of the regiment. During the evolutions of the regiment the defendant gave the command to fire, the regiment then facing the spectators, about three hundred and fifty feet distant, the colonel being eighty paces in front of the regiment. It was supposed that the guns were loaded only with blank cartridges, but a musket ball struck the plaintiff, permanently crippling her arm, and killed the child. It was proved that earlier in the day of this occurrence, the company from which the fatal ball must have proceeded, had been engaged in target shooting with ball cartridge; some of the guns were not discharged, although the caps exploded. In pursuance of orders, these guns were examined and supposed to be unloaded. There was a general order that each captain should cause an inspection of arms thirty minutes before going into line, to see that they were not loaded. The court left the

case to the jury, who found for the plaintiff. The court charged the jury that the plaintiff could not recover unless she proved negligence on the part of the defendant; that no action could be maintained against him for an act done by him in the execution of his office, and within the scope of his authority, if done with all reasonable care and caution; nor was he responsible for the negligence of those under his command, unless he gave an improper order, or neglected to give a proper one, or neglected some prudent and necessary precaution. The questions of fact not coming up for review on the appeal, we are left to conjecture to discover the ground of the recovery, but it probably was the firing in the direction of the spectators. This was rather hard measure for the gallant colonel, who had boldly exposed himself to the same or even greater peril. Probably he had witnessed the target practice that morning, and concluded that the danger of being hit was trifling. Perhaps, recollecting the man in the old Greek story, who, seeing an unskillful archer shooting at a mark, placed himself in front of the target as the only place of safety, he considered himself and the spectators in the safest position. If this be so, his contempt for the skill of his command cost him $1,500. Next time he will probably order them to fire in the air, having previously harvested all the small boys from the neighboring trees. The damages were, perhaps, mitigated by the proof that the regiment had humanely paid the doctors, and erected a monument to the child. The action was for the injury to the mother alone.

Ryan v. *The New York Central Railroad Company* (35 N. Y. 210) is a novel and interesting case. The defendants, through the negligent management of one of their engines, set fire to one of their wood-sheds. The flames communicated to and consumed the plaintiff's house, 130 feet distant. The plaintiff was nonsuited and the court of appeals affirmed the judgment, on the ground that the damages were too remote, and not the necessary and natural result of the negligence. The cases of the squib, the balloon and the wine cask were distinguished from this by the feature of intention which entered into them. But after giving this excellent and unanswerable reason for their judgment, the court proceed to strengthen their position by assigning another, entirely fallacious and ineffectual; they say the plaintiff ought not to recover, because "no such action has ever been sustained in the courts of this country, although the occasion for it has been frequent and pressing." By "sustained" the judge means "prosecuted." He then instances the great fire in Harper's publishing establishment, which arose from negligence, and says: "Yet we have no report in the books and no tradition of any action brought against them to recover such damages." He also quotes Littleton's rule, "what never was, never ought to be," which is about as reliable as "whatever is, is right." Now it seems a weak answer to a claim of right, that the claim is novel. In the class of cases under consideration, parties have generally had no inducement to bring their action, because they have been insured. And if they were not, the very wealth which would enable

the negligent party to respond in damages would deter the injured party from entering upon a long and expensive litigation. It is notorious that no judgment can be collected of a railroad company except at the very end of the law's rope.

Suppose Col. Duryea had set up in answer to Mrs. Castles that her claim was insupportable, because, although such occurrences must have taken place at musters before, yet people had suffered their wounds silently like good citizens, and said nothing about them, and so ought she. Would that have been an answer? The learned and accomplished judge who writes in this case would not have thought so. Chief Justice Shaw once condescended to use the same reason, in a case where he had another reason that was sufficient—*Anthony* v. *Slaid* (11 Metc. 290). The action concerned a pauper, and perhaps the judge thought a poor reason befitted such a case. But one good reason is better than a good one and a poor one, in any case. Judge Cowen once nonsuited a plaintiff for a reason that occurred to his mind, and not suggested by counsel. "And then, your honor," said the defendant's counsel, rising, "there is another reason." "What do you want of another?" interrupted the great judge, "isn't one *good* reason enough?"

It has been repeatedly held, that if one sets man-traps on his own land, he is liable for injuries arising therefrom, even to trespassers, unless ample notice has been given of the existence of the traps. But this rule does not apply as between the proprietor of a theater and an actor in his employ. So held in *Seymour* v. *Maddox* (16 Q. B. 326), which

was the case of an actress, who, in passing off the stage, fell through an open trap door and was injured. The court said the proprietor was under no obligation to guard and light such places, and made light of the plaintiff's injuries, remarking: "The servant is not bound to enter the master's service; but if he does and finds things in a certain state, he must take the consequences, if any, that may occur, owing to such a state of things." Now, would not the manager's liability in such a case depend, by this course of reasoning, on whether the trap was open or shut at the time the engagement was formed? If the actress hired out with the trap and her eyes open, of course she ran her own risks of herself and her engagement falling through together; but if it were then shut, had she not a right to presume that it would continue to be closed? How else could she be presumed to have "found things in a certain state?"

But it makes a difference, it seems, whether one is hurt in going down or coming up. Thus, in *Brydon* v. *Stewart* (2 Macq. H. L. 30), it was held, that where a workman in the mine of the defendant was killed while coming up, by a stone falling upon him, through the carelessness of the defendant, the defendant was liable in an action by the widow, although the deceased was coming up on a strike, and with the intention of quitting work, unless his demands were complied with. The House of Lords said that the defendant, having let the deceased down, was bound to bring him up in safety. So in the case of the actress — if, in the character of *La Comare,* in the opera of *Crispino,* she had safely

descended into the well, but, owing to the manager's want of care, had suffered injury in her ethereal person in coming up again, an action would have been maintainable. And if the *Ghost* in *Hamlet*, after having comfortably rendered up himself to sulphurous and tormenting flames in the first act, should experience, through the manager's negligence, while coming up to prod *Hamlet* in the third act, the correctness of Virgil's remark, *Facilis decensus Averni, sed revocare gradum*, etc., would not the manager be bound to make a sound man of the shattered ghost?

But though it makes a difference whether one is hurt in coming up or going down, it makes no difference, it seems, whether one is hurt in going forward or backward. Thus in *Milliman* v. *New York Central, etc., Railroad Co.* (11 N. Y. Sup. Ct. Rep. 409), it was held that where a passenger was about to alight from the defendant's car, which had been stopped for the purpose, but before he had time to alight the train was suddenly and violently started in a backward direction, prostrating and injuring him, he could maintain an action as well as if the train had been started in a forward direction.

During the prevalence of human bondage in this country, courts were much more apt to regard the "rights" of the master in his bi-furcated property, than the wrongs of the slave. So tender was the law of the claims of the slave owner, that they were even preferred, in South Carolina, to those of a whisky-vendor. In *Berkley* v. *Harrison* (1 Strobh. 525), a shopkeeper, in violation of the statute on that subject, sold ardent spirits, to wit: whisky, to

the plaintiff's slave, by means whereof the slave became intoxicated, lay out all night, and died. The court, in giving judgment for the plaintiff, said "the drinking and intoxication of the slave were the natural and probable consequences of selling liquor to him; the lying out all night was the immediate effects of the intoxication; and the two produced death." One cannot avoid admiring the superior humanity and wisdom of the South Carolinian laws, which gave the master the monopoly of drunkenness. In Sparta a father would make his slaves drunk as a warning spectacle to his sons, but I suppose in South Carolina the white furnished the warning and the black derived the lesson. Again, in *Wright* v. *Gray* (2 Bay, 464), the defendant, being concerned in a horse race, persuaded a negro boy belonging to the plaintiff, without the master's permission, to ride the defendant's horse, which, during the race, threw the boy against a tree and killed him. A verdict for the plaintiff was sustained on appeal, on the ground that one who officiously interferes with another's property, without his permission, is liable for all the consequences, whether intentional or not. If the horse had bolted into a free State with the boy, an interesting question might have arisen whether the defendant would have been liable for the consequent loss of the boy. In *Priester* v. *Angley* (5 Rich. Law, 44), the defendant permitted his infant son to take a gun to drive slaves from the defendant's cane patch, but cautioned him to fire so as not to hit any one. The son fired and scared one darkey so that he was of no more use to his master, except for his hide

and tallow. There was evidence that the son did not intend to take the negro's life. The defendant was held responsible for the value of the "critter."

If it were not for the following decision and one or two others similar to it, a new maxim might be introduced in the law — let the lender beware. The doctrine to which we refer is established in *Shields* v. *Edinburgh, etc., R. Co.* (Hay, 254). The plaintiff was injured in consequence of being knocked down by a van belonging to the defendants, and which was lent by them to A., who attached his own horse to it, and provided a driver. Held, that as the horse was not the property, and strictly speaking, the driver was not the servant, of the defendants, but of A., the defendants were not liable. If such an action had succeeded it should have been followed by a decree making the wagon a deodand. But those who lend guns or horses must be careful not to be present when they kick or do harm. In *Bishop* v. *Ely* (9 Johns. 294), where A. lent a wagon to B. and C., who each furnished a horse, and then, at their invitation, A. rode with them, B. driving, it was held that all three were jointly liable for the negligence of B. in driving too fast.

As the courts have the matter in their own hands, we are not surprised to learn, that in regard to negligence of attorneys and counselors, the rule is that they are liable only for clear and material negligence and evident incompetency. And after all, this is not unreasonable. It is so difficult to find out what the law is on any given point, or, having ascertained what it is, to conjecture what it may be

at the end of any particular suit, that any other rule would be a hardship. Therefore we rely on the golden words of the court in *Montriou* v. *Jeffries* (2 Carr. and P. 113), "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." But this branch of the subject is of little importance. Few lawyers are pecuniarily able to answer for their negligence, and to sue one would necessarily involve the patronage of another. It is better to "bear those ills we have, than fly to others that we know not of," especially when they may include "the law's delay."

PLEADING BEFORE THE CODE.*

"I think the Code contains, as I best recollect at this moment, only one thing which can be called new in principle, and this is an attempt at an absolute impossibility in prescribing the rule of pleading. It declares in substance and effect that you shall not plead, as in the old system, the conclusions in law or in reason from the facts of the case, and at the same time it prohibits you from stating or detailing the evidence merely on which you rely. You are required to state the "facts" which that evidence conduces to prove. Here, under the name of "facts," we find some things require to be stated which are neither in the vulgar sense of the word the mere fact, or transaction, or event, which did occur and can be proven by direct evidence, and are not the general, rational or legal conclusions from such fact, transaction or event.

"Now, according to my conception, it requires somebody much more wise and more subtle than

* "Pleadings," in a legal sense, are not the speeches of counsel in court, but the written allegations of the parties, plaintiff and defendant, stating the cause of action on the one hand, and the defense on the other, and forming the "issue" to be tried. A "demurrer" is a pleading interposed in answer to another pleading, and admitting the truth of the allegations in the pleading demurred to, but insisting that those allegations form no cause of action or defense, as the case may be. The New York Code is a body of statutes enacted in 1848, regulating the practice of our courts, and effecting many radical changes.

myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading drawn in compliance with this requisite of the code. I am not aware that any one has ever attempted to do it. The common practice in this State is to tell your story precisely as your client tells it to you, just as any old woman in trouble for the first time would narrate her grievances, and to annex by way of schedules, respectively marked A, B, C, etc., copies of any papers or documents that you may imagine would help your case. This is most emphatically a fair description of all the pleadings which come from the office of the chief codifier himself. *A demurrer to any pleading under the code is a very dangerous step,* because it is utterly impossible for the keenest investigator to determine in most cases what any other reader than himself will understand to be the import of the pleading if it be demurred to.

"You may well imagine under these circumstances, that except in the very commonest and very simplest of cases, there are no precedents which would be of use to one beginning to draw pleadings under the code. Its idea seems to be that every vulgar ignoramus, upon reading them, will, from their conformity to his own helter-skelter manner of thinking and writing, think them quite sensible and intelligible, and that a person of opposite character and habits shall always be unable to comprehend what they mean, and consequently be forced to conclude that he must suspend judgment on their merits until the trial, and that if the parties

then make out a case or a defense, the pleadings may then and there, or afterward, be amended, as occasion may require.

"It is truly laughable to one conversant with both systems to see the blunders into which lawyers of great ability, who have come to the bar within the past ten or fifteen years, sometimes fall in framing a declaration, plea, or subsequent pleading at common law in the circuit court of the United States."—[*Letter of Hon. Chas. O'Conor.*

I had supposed, until I saw the above, that the old rams of the law were done with butting at the code. One very able and conscientious judge went untimely to his grave with spite at the code, which he used to vent in his opinions, until it was evident that he was a monomaniac on the subject. But this was many years ago, and since then the main features of the code have been copied in several other States, and if there is any feature which has met with more general approval than another, it is that which Mr. O'Conor has selected for animadversion above. From some other parts of his letter, from which the above is quoted, I strongly suspect that he has at some time been unfortunate in demurring to some of "the pleadings which came from the office of the chief codifier himself." To my mind the highest praise which can be given to the code is contained in the words which he himself italicises. Can any one explain why the time of suitors, courts and community shall be consumed in contests about forms and modes of expression, which, after they are decided, leave the parties just where they started years before? Men are too busy and

too much in earnest in the nineteenth century for any such fooling. It was well enough in those halcyon, respectable and conservative days, a generation ago, when Mr. O'Conor and a few other eminent gentlemen monopolized the practice of the law, because pleading was so precarious and difficult. Justice was a jealous god, and was deaf to the entreaties of her suitors, unless they prayed according to established forms. It was no wonder that Mr. O'Conor, *et id omne genus*, sigh over the departure of the days when justice depended on pleading more than proofs, and they were the high priests who alone knew how to put up the prayers. But, if I remember rightly, demurring was always "a dangerous step." Woe be to the priest who did not pray according to rule; but still greater woe to the other priest, who objected that the prayer was not in the proper form, if it turned out that it was! And it was a matter of delicacy to determine how to wind up the prayer. The great British advocate, Mingay, in speaking for the defendant who was sued for the price of keeping a horse, and who defended on the ground that the fodder was of poor quality, said to the jury: "Gentlemen, the oats and hay were unfit to eat, and naturally the horse demurred." "He should have gone to the country," responded his antagonist, Erskine.

If any thing could justify the vulgar idea that law is a lie, and all lawyers are liars, the common-law system of pleading would do it. It was a grand scheme of lies. The science was monopolized by a few adroit word-spinners. The most skillful pleader was he who most deceitfully and ingeniously con-

cealed from his adversary, until the moment of trial, all suggestions of the real nature of the action. If the cause of action was a promissory note, he charged that the defendant was indebted to him for money lent and advanced, for money had and received, for money paid, laid out and expended, for goods, wares and merchandise sold and delivered, for work, labor and services done, performed and rendered, and every thing else under the sun except a promissory note. And so the wretched defendant remained in dense ignorance of what was to pay until he came into court. By-and-bye this state of things began to strike legislators and jurists as inconvenient, not to say unjust, and so the plaintiff was ordered to append to his declaration, in which he told all the aforesaid lies, a notice stating the truth, to wit: that the cause of action was a promissory note; or rather, that on the trial he would offer in evidence the note, the real cause of action, to give efficacy to the common counts, which constituted the lies. Common sense suggested the inquiry, if the notice is necessary and sufficient, what is the use of the lies? But we had told the lies so long and so often that we loved them and hated to give them up. They were part of the great science of pleading, and to be able to tell them in the right form was a feather in one's cap.

A beautiful outgrowth of this system was the doctrine of variance, which made fatal the slightest variation between the pleadings and the proof. Brown sued Jones in slander for calling him a "perjured, lying thief." On the trial it turned out that the words actually used were "perjured scoun-

drel and horse thief." This was a variance, and there was only one privilege left to Brown, and that was to pay Jones' costs and get out of court. The doctrine of amendment, about which Mr. O'Conor growls, was no part of our consistent system of lying.

Another pleasant feature of the old system of pleading was its impartiality. The plaintiff had no monopoly of lying. The defendant might lie, too. He might set up as many defenses as the ingenuity of counsel could invent, without regard to their consistency, and he sought a recompense for his ignorance of what the plaintiff was at, by keeping him just as ignorant of the real nature of the defense. The object of pleadings, it will be borne in mind, was ostensibly all this time to inform the court of the issue to be tried.

When we came into a court of conscience, of course, one would suppose that all this was remedied. That was the principal reason for having such a court at all — to afford a refuge in certain cases from the court where lying held sway. But there must be some recompense for being compelled to state the truth, theoretically, and what was it? Why, lawyers were encouraged to make the pleadings as long as possible, by receiving pay in proportion to their length. And so expert did the profession become in the pleasant pursuit of money, that the pleadings in courts of chancery, or conscience, by reason of their prolixity, grew to answer nearly the same benign purpose as those in courts of law, or lying — *i. e.*, of not furnishing any hint of the *real issue*.

The syllabus of *Bloss* v. *Tobey* (2 Pick. 320), decided in 1824, is as follows:

"Simply to burn one's own store is not unlawful, and the words, 'he burnt his own store,' or 'there is no doubt in my mind that he burnt his own store; he would not have got his goods insured if he had not meant to burn it;' or a general allegation that the defendant charged the plaintiff with having willfully and maliciously burnt his own store, will not sustain an action for slander without a colloquium or averment setting forth such circumstances as would render such burning unlawful, and that the words were spoken of and concerning such circumstances; and the want of such colloquium or averment will not be cured by an inuendo."

The report states that the defendant's counsel were Mills, Whiting and Dwight. After careful and extended inquiries among men from Berkshire county, we have learned that these were very distinguished men in their day, and we have no doubt that posterity, or at least that portion of it which shall peruse the said report, will hold them in due reverence. The report goes on to state that the distinguished gentlemen above mentioned, at the September term, 1823, moved in arrest of the judgment obtained by the plaintiff, and that "Bryant, for the plaintiff, furnished the court in vacation with a written argument," etc. Now, this Bryant, we fear, had not a legal mind, and instead of trying to suppy his natural deficiencies by studying the grand principles of common-law pleadings, he was much addicted to poetry. Even when in college, at the age of eighteen, he had written and uttered some

verses which he called Thanatopsis, of which some of our readers may have heard. And even after he had been some time in the profession, he allowed himself to be instigated by this unhallowed passion for poetry to write:

> "Though forced to drudge for the dregs of men,
> And scrawl strange words with the barbarous pen,
> And mingle among the jostling crowd,
> Where the sons of strife are subtle and loud."

The consequence of all this was, that his said client, Bloss, lost his case through his attorney's incapacity to draw a common-law declaration, and that attorney was condemned to hear from the wise and mild Chief Justice Parker such words as these: "It is with great regret, and not without much labor and research to avoid this result, that we are obliged to arrest the judgment in this case for want of a sufficient count to support the verdict. * * * If the plaintiff has sustained a serious injury, another action may give him indemnity. In a matter of technical law, the rule is of more consequence than the reason of it; and however we may lament the lost labor and expense of the suit, we find ourselves wholly unable to prevent it." No wonder the attorney was ashamed to face the court with an oral argument, but sent it in that underhand manner, "in vacation," and in writing. How that unfortunate young man must have felt, and how he must feel now, at the age of seventy-eight, when he reflects, as he must inevitably reflect, that, instead of occupying the proud eminence of a man who knew how to draw a common-law declaration — of *such men* as Mills, Whiting and —(what's-his-

name?)— Dwight, he must go down to posterity as William Cullen Bryant — nothing but the greatest of American poets, and tenant of the highest niche in American general letters. We would say naught to render the old man's last years uneasy, but we would simply ask, what recompense can it be for these lost opportunities that he can read his name in the biographical dictionaries, and count his foreign honorary titles by the dozen? We dare say, if he could reflect that he got that declaration right, he would gladly give up all the transitory honor of having made the best translation of those foolish old ballads of Homer. Our profession indeed owe Berkshire county a grudge, for not content with having produced this sneerer at our sublime calling, this reprehensible locality* has given birth to another and more dangerous person, who, being himself a lawyer, has had the audacity, at one fell swoop, to abolish those elevating, those subtle, those humanizing, those refining, those highly necessary principles of common-law pleading on which our institutions were founded, and which the dreaming Bryant hadn't the intellect to comprehend, and to introduce in their place a system under which it can no longer be said, in the golden words of Chief Justice Parker, "the rule is of more consequence than the reason of it." Surely the ways of Providence are mysterious. Bryant, thou art avenged!

Such, in brief, and as I believe without exaggeration, was the Paradise from which Mr. Field and

*Berkshire county, Massachusetts, is the birthplace of David Dudley Field, the chief codifier of New York.

those other mistaken reformers so ruthlessly ejected Mr. O'Conor, Judge Barculo, and the rest of the proficients in the difficult science of pleading. And to what a barren and dismal waste have we been turned out! Just see: the complaint must contain "a plain and concise statement of the facts, constituting a cause of action, without unnecessary repetition." The answer, in addition to denials, may set up counter-claims "in ordinary and concise language, without repetition." The plaintiff may compel a sworn answer, by verifying the complaint. In considering pleadings for the purpose of determining their effect, they shall "be liberally construed, with a view of substantial justice between the parties." If pleadings "are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require them to be made definite or certain by amendment." No variance between pleadings and proof is material, "unless it actually have misled the adverse party to his prejudice;" and even then "the court may order the pleading to be amended, upon such terms as shall be just." The party may amend his own pleading under certain circumstances and in certain particulars, as a matter of course, and the court may always, on motion, amend the pleading "in furtherance of justice" and on proper terms. And finally, "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party."

Now, of course, the intricacy of such a system must be very embarrassing to such simple and in-

experienced souls as Mr. O'Conor, trained to the simplicity and luminousness and intelligibility of pleadings under the old system. No doubt he misses the pleasant excitement and suspense, which, under the ancient rule, pervaded the mind of the practitioner, until he had steered safely past all the troublesome rocks which beset the telling of his client's story, and the conforming the proof to it. But he is too modest in conceiving that "it requires somebody much more wise or more subtle than" himself to learn to draw a pleading in compliance with the rules of the code.

But seriously, it is to my mind one of the best features of the code that, "except in the very commonest and very simplest of cases, there are no precedents which would be of use to one beginning to draw pleadings" under it. Instead of precedents, it is truth that is required under the code. A form that fits one case must necessarily be false when applied to most others. "Circumstances alter cases," and a concise statement of the facts in each case will be more promotive of the development of truth than a Procrustean precedent for all cases. We really hope that Mr. O'Conor will be more successful in his search for precedents than that lawyer and inveterate wag, who rushed into an attorney's office during the sitting of the circuit, apparently very much out of breath, and asked his friend if he could lend him "a blank form of speech for plaintiff's attorney in an action of assault and battery, where the defendant had kicked the plaintiff on the dock."

In conclusion, the code seems likely to live and thrive. The "conflict in opinion" as to its merits

is confined to the imagination of Mr. O'Conor, in my opinion, and those judges who have "committed themselves" to "a lack of respect for its design, execution and effect," must belong to that class, of one of whom Sam. Weller said that "he commits himself twice as often as he commits any one else." They have descended from the bench never to return, and all the people say amen.

PLEADING UNDER THE CODE.

THE pretext for this article will be found in section 142 of the New York Code of Procedure, which enacts that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition.

One peculiarity of the common-law rule of pleading, claimed by its adherents to be a virtue, was its uniformity. To be sure, its uniformity reminds one of the man who said his wife had a remarkably even temper — always cross. For each kind of action there was a certain prescribed lie, or, rather, a class of prescribed lies, and all a party had to do to interpret any pleading was to recall the form of lie, or class of lies, prescribed for the particular case, and guess at the truth. For instance, to give an idea of the absurdity, let us suppose that the cause of action is a promissory note, and that the rule of pleading should dictate that the declaration in such cases should count upon an assault and battery; it is perfectly simple, one has only to remember that assault and battery means promissory note, and the thing is done. It was something like the science of mnemonics, by which all one had to do to remember any particular fact, or number of facts, was to remember a certain other fact, or number of facts,

having no apparent connection with the principal fact, and consequently, a great deal more difficult to be remembered. It was perfectly surprising how many names or dates one could be taught to remember by having memory enough to remember a corresponding number of things, which might suggest the former. Now, they say the code has abrogated this uniform and convenient method of getting at the issue, and substituted a very uncertain and indefinite rule, to wit: that the complaint shall state the facts constituting the cause of action. No two cases are alike, say they, and how is one to know what anybody else would call the facts? To those who were educated under the old practice this was at first quite troublesome. They were so accustomed to lying, under the old system, that they found it difficult to state the facts under the new. They yearned for the old lies, labor-saving, even if deceptive. One trouble complained of under the new rule is said to consist in drawing the line properly between the statement of the *facts*, and the statement of the evidence tending to establish those facts, or in distinguishing between a statement of *facts* and the statement of a *legal conclusion*. This is a stumbling block not only to the admirers of the old school, but to many who prefer the new state of things, and have scarcely acquired a reason for the faith that is in them.

It must be admitted that there are some cases of difficulty under this theory of pleading, but they are very few. Generally, the rule is easy of application. So easy is it, in a great majority of instances, that it is really laughable to see how many intelli-

gent men go astray from it. Thus, although it is of course competent to show, as part of the *res gestæ*, that, during the commission of an assault and battery, the defendant used violent, threatening and profane language, yet it is hardly necessary or proper to allege it in the complaint, as was once done in a case within my knowledge. "A lick with the rough side of the tongue" is not a part of the assault and battery for which damages will be awarded.

As an example of an extraordinary statement of facts in the complaint, take the following: The action was brought by a sister, to obtain a decree setting aside her deceased brother's marriage, on the ground that he was a lunatic, and under the charge of a committee, at the time he was married. The complaint charged the facts of the marriage as follows: "One P. Q., who is a lawyer by profession, and a first cousin of A. B."— the lunatic — "and at the time, possessed of great power of control and influence over the said A. B., from improper designs him thereunto moving, operating on the advantage of his said power, control and influence over the said A. B., shortly before, and in close connection with, the time of said marriage, took, carried and accompanied the said A. B., in and with a *double-horse conveyance*, belonging to the father of the said P. Q., to ——— aforesaid, and to the residence of one C. D., a sister of the said P. Q., and who kept a boarding-house there at the time, which was at a point distant about seven miles from the residence of the said A. B., in the town of ———, aforesaid, the said defendant"— the

widow — "then residing at her father's house, on ——— street, in the city of ———, to which house, soon after their arrival at ———, as aforesaid, the said P. Q., accompanied by the said A. B., went after the said defendant, and brought her to the boarding-house of the said C. D., at ———, aforesaid, where the marriage service hereinbefore mentioned was performed by a man reputed to be a Methodist minister"— there was some method in A. B.'s madness, it seems —" as this plaintiff is informed and believes, named X. Y., but whose location now, or, if living or dead, is entirely unknown to this plaintiff." (The law does not require impossibilities, and consequently would not demand keeping track of a Methodist minister's location in *this* life, to say nothing of a future state.) The answer to this remarkable complaint is worth quoting in one particular: "The defendant admits that, when she and said A. B. went to be married, they rode in a double wagon from ——— to ———, but she avers that she did not know then, and is still unaware, that there was any wrong or illegality in riding, to be married, in a double wagon." Probably the draftsman of this complaint thought that a stronger inference could be drawn against the validity of the marriage, if he hitched a double team to it.

Perhaps as good an example of pleading the evidence instead of the facts, as can be found in fiction, is in *Dame Quickly's* accusation of *Falstaff*. The fact which the hostess meant to aver was that Jack had promised to marry her, but in her garrulous and detailed statement it grew into these pro-

portions: "Thou didst swear to me, upon a parcel-gilt goblet, sitting in my Dolphin chamber, at the round table, by a sea-coal fire, upon Wednesday, in Whitsun week, when the prince broke thy head for liking his father to a singing man of Windsor; thou didst swear to me then, as I was washing thy wound, to marry me, and make me my lady thy wife; Canst thou deny it? Did not good wife Keech, the butcher's wife, come in then, and call me gossip Quickly? coming in to borrow a mess of vinegar; telling us she had a good dish of prawns; whereby thou didst desire to eat some; whereby I told thee they were ill for a green wound? And didst thou not, when she was gone down stairs, desire me to be no more so familiarity with such poor people; saying that ere long they should call me madam? And didst thou not kiss me, and bid me fetch thee thirty shillings? I put thee now to thy book oath; deny it, if thou canst." It has been conjectured that Shakespeare was, at some period of his life, a law clerk, and Lord Campbell summed up the evidence on the question in a pamphlet. If his lordship had been acquainted with the early days of our code, he would have admitted, that even if the great dramatist had never drawn a bill in chancery, he had at least anticipated the scope and form of many of the complaints under that much-abused and hardly-understood body of laws which regulates our practice.

The pathetic and rhetorical flights of eloquence are not impossible in a complaint under the code. In an action for negligence that once came under my notice, the plaintiff described the result of the

injuries as follows: "Thereby rendering her, as she the plaintiff is informed and believes, forever unable to work, and precluding her from gaining a livelihood, and from all the benefits and enjoyments in life, to which she, this plaintiff, in common with each and every member of the human race, is an heir and an inheritor." To which the heartless defendants answered that they had no knowledge or information sufficient to form a belief, "as to whether she is an heir and inheritor of the benefits and enjoyments of life, or any of them, and demand that in respect to the same she trace her pedigree and prove her title."

I had supposed until I saw the foregoing that pathos and eloquence in pleading had been exhausted before the code in the case of *Barron* v. *Richard* (3 Edw. 96). This was a suit to restrain the defendant from using a coal yard, under a covenant in a deed not to carry on or permit any trade or business offensive to the neighboring inhabitants. The bill contained the following ornate passages: "In which during several successive months last past they have daily received and still continue to receive coal of divers and many sorts; and to break it up and screen or sift the coal so broken, and separate the same from the dust; and they have there sold and continue to sell such coal and load it into carts, and to carry it away, and to conduct the business with all the ordinary circumstances and practices usual in such business, and to occasion large quantities of the black, filthy, volatile, offensive dust and smut, usually incident to a coal yard, where much business is done, to rise on the air and

to be diffused around by the wind and into the premises of the neighboring inhabitants; and in spite of all the care which the neighbors can bestow, such coal dust and smut will settle on their walks, on their green sward, on their fragrant plants and flowers, beclouding the brightness and beauty which God has given to make them pleasant to the eye and cheering to the heart of man. They settle too on the neighbors' steps, thresholds and windows; and enter into their out-houses, their dwellings, their carpets, their cups, their kneading-troughs, their beds, their bosoms, and their lungs; discolor their linen and their otherwise stainless raiment and robes of beauty and comfort, deface their goodly furniture, blacken, besmear and injure every object of utility, beauty or taste, and are thus offensive and injurious to all the neighbors who have regard for decency and cleanliness, so essential to the health and happiness of society, and by reason of the immediate proximity of your complainant they are to him peculiarly offensive and injurious." The defendants demurred, but the vice-chancellor's sympathies were so wrought upon by this touching statement, that he held the bill good. On appeal he was sustained by the chancellor, who observed: "The allegation in the bill on this subject, though it is a little poetical, cannot be considered a mere poetic fiction, as it is sworn to by the complainant and is admitted by the demurrer. Making all due allowance for the coloring which the pleader has given to this naturally dark picture, it is perfectly certain that this keeping of a coal yard upon any of those lots is a business offensive

to the neighboring inhabitants, according to the spirit and intent of these restrictive enactments."

Another troublesome feature of this requirement of the code is, that the facts shall be stated in a plain and concise manner, without unnecessary repetition. It would be sad, indeed, if justice depended upon the strength or copiousness of a pleader's language. The office of pleadings is not to scare, confound or overwhelm the adverse party. It may be true, as Napoleon said, that Providence is on the side of the heaviest battalions, but justice is not necessarily on the side whose lawyer has the greatest command of synonyms. Words are cheap. Those who have the least to say, or are uncertain how to say it, generally have the most of them. Here is the difficulty of the rule of the code; it presupposes that the pleader knows exactly what he wants. Now, when we were among the leeks and cucumbers of the Egypt of pleading at common law, this was not so material. But granting that the pleader knows what he wants, how hard it seems to be for him to call a spade a spade. He seems to be continually laboring under the delusion that if he calls things by their right names something awful will happen; that he is wandering about the temple of justice in a state of enchantment, being bound to flank every fact by verbal circumlocution, for fear the use of a common word or a direct and simple phrase will wake him up, and tumble the temple about his head. He is possessed by the demon having charge of the "long-tailed words ending in osity and ation." And how he loves to accu*mulate* — to add to each succeeding allegation all

that went before. Many pleadings are apparently drawn in the idea that every allegation is forgotten or loses its virtue as soon as read, and so the pleader rolls along his snow-ball of words, growing bigger and bigger and more unwieldy and shapeless to the end. It is like "the house that Jack built;" "this is the cow with the crumpled horn," being utterly ineffective, unless connected with the preceding allegations, "that tossed the dog, that worried the cat," etc. As the judge in Racine says of the advocate:

"To repeat the same thing twenty times he prefers by far,
Than once to abridge."

It is quite fortunate for the reputation of our profession among authors, that the world do not see our pleadings. If they were public, Whittier might speak of "weary lawyers with endless pens," as well as "tongues." Really, the mass of people have no idea of our industry. The Pyramids, the Colossus of Rhodes, the Simplon road, are well enough in their way, but if you want to get an adequate idea of the industry, the ingenuity, and the perseverance of man, read a law-pleading. The Cretan labyrinth is not so involved; the Sphynx is not so mysterious; like a suspension bridge, its middle rests on nothing, but it is continuous and self-sustaining; take an allegation out of the center, although it is just like a dozen others preceding it, and down goes the structure. Reading one of these pleadings is like crawling through a long and narrow tube — you can't turn around; but, having once started, you must go through to the other end,

or else back out. Of course, all this is very fine, but it is not law; *c'est magnifique, mais ce n'est pas guerre.* A man may develop a great amount of muscle in endeavoring to lift himself by his boot-straps, but the experiment is always a failure, and answers no useful purpose. So a man may, even under the code, get a great reputation as a pleader, by drawing interminable pleadings that bother the other side very much, but, after all, don't help his side on a bit. It is no wonder that Mr. O'Conor, driven to desperation by such pleadings, should say that they tell the client's story, "just as any old woman in trouble for the first time would narrate her grievances." Not that Mr. O'Conor is strictly accurate in this harsh reflection upon the "old woman." No old woman of my acquaintance, in describing her being knocked down by a runaway horse, has ever told me that it occurred "while she was lawfully and carefully walking in, upon and across a certain public street, highway and thoroughfare;" or in narrating an assault and battery committed on her, has ever informed me that the defendant struck her "a great many violent blows and strokes in and upon various parts of her body and person;" or, in describing its effects, has ever said that she became "sick, sore, lame, bruised and disordered;" or, in unfolding the particulars of some slanderous accusation, has ever intimated "that the defendant, unlawfully, willfully and maliciously intending and contriving to injure her in her good name, fame and credit, and bring her into discredit, disrepute and infamy among her friends, neighbors and acquaintances, and the public, spoke,"

etc. I do not number any such rhetorical and tautological elderly lady on my list of clients, and I strongly suspect that Mr. O'Conor never fell in with her. These ingenious flights are the work of the Sinbads of the legal profession, and are not chargeable on any layman or laywoman. They are the traditionary remnants of that ancient system of pleading which Mr. O'Conor reverences and mourns for. The poet Moore sings, in his sweet way:

> "Like a vase in which roses have once been distilled,
> You may break, you may shatter the vase, if you will,
> But the scent of the roses will cling to it still."

And applying this idea to the present subject, I should sing:

> In a skull if tautology's once been instilled,
> You may break it and scatter its wig, if you will,
> But the trick of tautology clings to it still.

Now we have dropped into poetry, allow me to offer a little original poem on this topic, to which, I suspect, Mr. Longfellow is somewhat indebted for some famous verses of his:

A PSALM OF LAW.

What the heart of the Codifier said to the Pleader.

Tell me not, in accents croaking,
"Brevity's an empty dream;"
What's the use, with verbal cloaking,
To make things other than they seem?

Law is real; and law's expensive;
Special pleading's not its goal:
Rhetoric and tape make pensive
Many a weary client's soul.

To orate, or rouse to passion
In your pleading 's not the way;
State your case in simple fashion,
Let the judge see what's to pay.

Law is long and time is fleeting,
And our lips, dull habit's slave,
Are, forgetting fact, repeating
The old forms our fathers gave.

In the field of litigation,
In the strife of good and evil,
With straightforward allegation
Tell the truth and shame the devil.

Trust not Humphrey, Barbour, Chitty;
Let dead cases bury their dead;
With stale lies 'tis surely pity
To bother any judge's head!

Lives of pleaders all remind us,
We may make our lives a bore,
And, departing, leave behind us
Pleas choke full of useless lore;—

Precedents that perhaps another,
Doomed by cruel fate to find,—
Some perplexed and anxious brother,
Reading, shall quite lose his mind!

Sell your form books for waste paper;
State the facts at any rate;
Hesitating how to shape a
Pleading — why, abbreviate.

But as there is an alleviating feature of almost every evil, so the repetitions of lawyers argue one virtue at least: they prove that our profession are willing to give money's worth and more, for we are no longer paid in proportion to the dimensions of

the verbal pyramids which we erect. We are willing to throw in a few hundred extra and unnecessary adverbs and prepositions, and are not parsimonious even in the matter of nouns.

Part of this diffuseness is chargeable on our clients, who would not believe us half so wise if we were only half as long in our pleading. A man suffering from tooth-ache once went to a dentist and asked him how much he would charge for extracting the offending member. A dollar, was the reply. "Why," exclaimed the patient, "Doctor Jones only charged me half a dollar the other day, and dragged me all round the office, too!" Our clients want to be dragged all around the office, and all over creation, when we state their rights and wrongs on paper.

In conclusion, I will advert to a topic, which, although not strictly covered by my text, is yet germane to it. I refer to the phraseology of indictments. If any one can give any plausible excuse for the use of nine-tenths of the words in any indictment, I am curious to know it. The commission of crime may be just as definitely charged in a score of words as in ten score, and rather more definitely, for the memory is not taxed in the former case. It has always seemed to me inhuman to compel a man accused of a capital offense to listen to the reading of the indictment. It is an added bitterness to death. To be sure it consumes time, in which circumstances may come to light tending to exculpate the accused. A refined humanitarian, opposed to capital punishment, like Horace Greeley or Mr. Bergh, might act on this idea, and contrive

an indictment so long that its reading would allo
the prisoner to die a natural death. The sulta
once offered immense largess and honor to hi
who would invent a story without end — untol
wealth and the hand of his daughter in marriag
Any one was at liberty to contest for the prize, b
in case of failure, the bowstring was the penalt
A good many had fallen victims to their greed a
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an indictment so long that its reading would allow the prisoner to die a natural death. The sultan once offered immense largess and honor to him who would invent a story without end — untold wealth and the hand of his daughter in marriage. Any one was at liberty to contest for the prize, but in case of failure, the bowstring was the penalty. A good many had fallen victims to their greed and their short-windedness, when another competitor presented himself, who, I have reason to believe, was an old-time English special pleader. The sultan seemed to be moved with compassion, and asked him if he had duly weighed the matter. He replied that he had. Said the sultan, "one fellow told me a story that lasted eleven months; do you think you can beat him?" The brave man smiled superior; the preliminaries were settled; so was the listener; and the *raconteur*, after enumerating the great man's titles, which occupied some hours, thus commenced: "Once upon a time there was a king of Egypt, who, anticipating a mighty famine, caused an immense granary to be erected and filled with wheat. It was four hundred miles square and five miles high, and as he supposed, hermetically sealed. It seems, however, that a hole, near the top, about as large as a pipestem, had been overlooked. The next year an enormous swarm of locusts overwhelmed the land. They discovered the orifice, just large enough for one locust to enter at a time, and so one locust crawled in and flew away with a kernel of wheat, and then another locust crawled in and flew away with another kernel of wheat, and then another locust crawled in and flew away with

another kernel of wheat, and then another—" "Well," interrupted the sultan, "I suppose the locusts carried off all the wheat, and then what?" "Why," answered the narrator, "how can I tell your ineffable majesty what happened after the wheat was all gone, until I first describe to you the process of its abstraction? I will endeavor not unnecessariiy to procrastinate, but really these details seem essential. They may consume some time. Considering the dimensions of the magazine, and the amount of time which your inextinguishable sanctity is willing daily to bestow on your worm of a narrator, I conscientiously think I may finish this introductory part of my story in — well, say, a half a century — and then we shall be quite fresh and ready to enter on the merits." The sultan stroked his beard, groaned, and gave it up.

Perhaps in these days, when crime seems so frightfully on the increase, it might have a restraining and salutary effect to abolish capital punishment and substitute the reading of the indictment. The prospect of such a fate would deter the boldest and the most wicked. In aggravated cases, where methodical lunatics slay men who they fancy have hurt their honor, I would add the penalty of listening to the testimony of the medical witnesses on the subject of insanity. If the offenders were not really mad, they soon would be. Possibly this plan would be open to Montesquieu's objections against punishments unduly severe. Possibly the offenders would take themselves off to evade the penalty, and thus save the State all trouble. But there is a sort of poetic justice in the idea that

pleases me, and I am by no means certain that I have not hit on the universal panacea that shall give peace and safety to society.

Having now strayed to the customary and orthodox distance from my text, I will dismiss the meeting.

A SOCIETY FOR THE PREVENTION OF CRUELTY TO LAWYERS.

I HAVE latety experienced two severe shocks upon my nervous system. This fact has led me to contemplate the propriety of establishing some plan of protection for lawyers. Of course, it is conceded that, as a class, we are utterly reprobate and given over, and that when we die, we must, nearly all of us, go to the bad. However, as in that event, we shall unquestionably be accompanied by a vast majority of our clients, much of the bitterness of that reflection is extracted. But it is cruel for a person of superior genius or virtue to be continually crowing over one to whom Providence has been less bounteous, or Satan more attentive. It is naughty to throw stones at a drunken man. And so it is wrong for clergymen and other sinless and untempted men, to twit us lawyers with our fallen condition. Now my idea is, that we ought to band together for self-protection against these angelic assaults, or that the State ought to furnish a system of police for our defense. I am usually very particular, when I go out of town to court, to conceal every thing indicative of my profession, but in going to Albany the other day, I forgot my accustomed caution, and tied my bundle of papers with red tape. On the cars I was sharply scrutinized by a dyspeptic and saintly gentleman, who looked too

good for this world, and out of whose shoulders I expected momentarily to see a pair of wings sprouting; presently he approached me, and in a hollow voice, asked me if I were not a lawyer — much in the manner that you would ask one if he were not the devil. I replied, in a deprecatory manner, that I was one of that unhappy and despised race. Thereupon he pressed upon me a printed paper, at arm's length, as if I were a leper, and hastily retreated. I read the paper, which was in the words and figures following:

"AND THEN?"

"A young man, whom I had known as a boy came to an aged professor of a distinguished continental university with a face beaming with delight, and informed him that the long and fondly cherished desire of his heart was at length fulfilled, his parents having given their consent to his studying the profession of the law. As the university presided over by his friend was a distinguished one, he had repaired to its law school, and was resolved to spare no labor or expense in getting through his studies as quickly and ably as possible. In this strain he continued for some time; and when he paused, the old man, who had been listening to him with great patience and kindness, gently said, 'Well, and when you have finished your career of study, what do you mean to do then?' 'Then I shall take my degree,' answered the young man.

"'And then?' asked his venerable friend. 'And then,' continued the youth, 'I shall have a number of difficult and knotty cases to manage; and

shall attract notice by my eloquence and wit and acuteness, and win a great reputation.'

"'And then?' repeated the aged man. 'And then!' replied the youth; 'why, then there cannot be a question I shall be promoted to some high office in the State, and I shall become rich.'

"'And then?' 'And then,' pursued the young lawyer, 'then I shall live comfortably and honorably in wealth and respect, and look forward to a quiet and happy old age.'

"'And then?' repeated the old man. 'And then,' said the youth, 'and then — and then — and then I shall die.' Here his venerable listener lifted up his voice and again asked with solemnity and emphasis: 'And *then?*' Whereupon the aspiring student made no answer, but cast down his head, and in silence and thoughtfulness retired. The last '*And then?*' had pierced his heart like a sword, had darted like a flash of lightning into his soul, and he could not dislodge the impression. The result was, the entire change of his mind and course of his life. Abandoning the study of the law, he entered upon that of divinity, and spent the remainder of his days in the labors of a minister of Christ. — [*No.* 154 *American Tract Society.*"

Now, one of the main purposes of my Society for the Prevention of Cruelty to Lawyers would be to issue tracts aimed at other people than lawyers — say clergymen, for instance. Adopting the foregoing courteous and winning exhibit as my model, I would suggest the following:

AND THEN?

A young man, who never was a boy, came to an aged professor of a distinguished law school, with a face full of gravity, and informed him that the long and fondly cherished desire of his heart was at length fulfilled, his parents having given their consent to his studying the profession of divinity. As the university with which his friend was connected was a distinguished one, he had repaired to its divinity school, and was resolved to spare no labor or expense in getting through his studies as quickly and as ably as possible. In this strain he continued for some time; and when he paused, the old man, who had been listening to him with great patience and kindness, gently said: "Well, and when you have finished your career of study, what do you mean to do then?" "Then I shall take my degree," answered the young man. "And then?" asked his venerable friend. "And then," continued the youth, "I shall have a great many knotty and difficult dogmas to reconcile with common sense, and shall attract notice by my eloquence, my dignity, and my abuse of lawyers and other bad men, and shall claim to wield the power of the Almighty in condemning to perdition all clergymen and other Christians who shall dare to differ from me in opinion, and the members of all professions who shall dare to contend with the clergy for a share of the respect and confidence of their fellowmen, and shall win a great reputation." "And then?" repeated the aged man. "And then," replied the youth, "why then there cannot be a question I shall be called by some wealthy congregation,

and shall marry a rich wife." "And then?" "And then," pursued the young divine, "then I shall live comfortably and lazily in wealth and respect, and look forward to a quiet and happy old age." "And then?" repeated the old man. "And then," said the youth, "and then — and then — and then I shall probably die." Here his venerable listener lifted up his voice, and again asked, with solemnity and emphasis: "And *then?*" Whereupon the aspiring student made no answer, but cast down his head, and in silence and thoughtfulness was retiring, but as he got to the door, he slowly and sadly answered: "Why *then* I suppose I shall be sorry I wasn't a lawyer." This last "And *then?*" had pierced his heart like a sword, had darted like a flash of lightning into his soul, and he could not dislodge the impression. The result was the entire change of his mind and course of his life for the better. Abandoning the study of divinity, he entered upon that of the law, and spent the remainder of his days as an honest, useful, and civil lawyer.— [*No.* 154 *Society for the Prevention of Cruelty to Lawyers.*

Another main purpose of my society would be to keep track of and refute the misrepresentations — (I desire to be gentlemanly in my choice of words)— of authors. And now for my other shock. One of the most charming writers in English literature is Arthur Helps, author of "The Spanish Conquests in America," "Friends in Council," etc. In one of his earlier works, "Companions of my Solitude," in the course of a gloomy view of law and lawyers, he says: "These evils are not of yesterday, or of

this country only; I observe that the first Spanish colonists in America write home to the government, begging them not to allow lawyers to come to the colony." Now here is where my other shock comes in. If the author had cited Herod as an example of philoprogenitiveness; Nero as a model of filial affection; Alaric, Attila and Genseric as peace-makers; Philip Second as an advocate of civil and religious liberty, or Henry Eighth as a precedent for conjugal fidelity, my nervous system would not have undergone the shock that it experienced at hearing him cite the antipathy of "the first Spanish colonists in America," as any thing against lawyers.

Who were "the first Spanish colonists in America," and what was the moving principle of their emigration? They were a crowd of adventurers and vagabonds, who came to this country to subsist on the stolen gains and labors of other men — a pack of thieves and cut-throats, who, starting out under the banner of church aggrandizement or maritime discovery, through the *auri sacra fames* fell into the most dreadful course of oppression and injustice that the history of the world records — oppressions on an amiable and unoffending race, which in some instances, as for example in Cuba, they almost exterminated in their mad and wicked hunt after money without labor. The roasting of Indians was a pursuit in which lawyers would have been of no use. Such mild-mannered gentry as Pizarro and Cortez needed no rascal attorneys to aid them in their efforts for the conversion of heathen Mexicans and Peruvians, as recorded by

the Spanish historians. Where law and justice are unknown, lawyers are superfluous. Fair play was a consideration that did not enter into the plans of "the first Spanish colonists in America," and so those of them who survived the ravages of venereal diseases on their first arrival, unanimously besought the government to keep the lawyers at home, in order that they might ravage, slay and extort, unchecked by courts of justice. They wanted such a state of things as Pat wrote to his brother in Ireland was the rule in this country — "no hangin for stalin." I wonder that Mr. Helps did not also quote the remark of Peter the Great on his visit to England, that he had but two lawyers in his dominions, and meant to hang one of them on his return; or that of Jack Cade's friend, who said, "the first thing we do, let's kill all the lawyers." The truth is that lawyers cannot flourish except in a free and enlightened country, and their numbers and influence are in proportion to the degree of freedom and enlightenment. I dare say there are not many lawyers in New Zealand or China. There are only some eighteen hundred in Prussia, although I look for their rapid increase there under the influence of recent events. In France we find twelve thousand, in Great Britain thirty thousand, and under the government founded in the idea of fair play and absolute equality before the law, we have forty thousand of this incendiary class. In the face of such facts, Mr. Helps should not cite the opinion of "the first Spanish colonists in America," nor of the fiends in perdition, although I dare say these admi-

rable characters would agree in the desire to suppress the lawyers.

A subsidiary purpose of my society would be to keep the newspapers honest in their reports of lawsuits and remarks about lawyers. Nothing unreasonable should be required of them; if one report in three were moderately correct, it is all that could be exacted. All of us, from the judge, who is always delivering an "impartial and comprehensive charge," to the advocate who never makes any but an "able and eloquent effort," feel the power of the press; but we know, too, that pecuniary offerings soothe the terrible deities who preside over it, and allay their just wrath, and, consequently, my society should establish a sinking fund, to provide against the virtuous spasms of the newspapers.

Another minor purpose of my society would be to protect lawyers against law reports. If we were expected only to know the contents of the reports, that we could get along with; but when we are required to pay for them, that strikes home. Not only this, but how is one going to house them? If they go on much longer, every lawyer will be forced to hire a rope-walk to keep his books in. Oh for some Omar or Von Moltke, to burn some new Alexandria or Strasbourg with all the law reports! A pension list might be made for the reporters, conditional on their issuing no more reports, or, at all events, not more than one or two volumes a day.

I would also have my society suppress bar meetings on the death of lawyers. This I put mainly on the ground of the poverty of our language in

adjectives, and its utter inadequacy to describe the virtues which pertain to us from the moment we die.

Perhaps I may think of some other things for my society to do, but these are all that now occur to me.

NUISANCE.

THE law is careful of the eyes, ears and noses of mankind, and will not justify offensive sights, sounds, or smells, but will punish as crimes offenses against those necessary and sensitive organs, provided such offenses involve a general and public disturbance. But the offense must be rank, and smell to heaven, to sustain an indictment. Otherwise, nothing more than an action for damages will lie. Quite an extraordinary catalogue might be made of the complaints which nervous people have made against their neighbors — to say nothing of serious attacks upon health by offensive trades and occupations which have come before the courts. Concert saloons and locomotives, bowling alleys and butting rams, billiard saloons and biting dogs, boiler shops and bathing in exposed situations, swearing and slaughter-houses, obstructions to travel in public streets by means of too attractive shop windows, or the vending of distillery slops; and a score of other things, have constituted the cause of action under this head. Let us glance at a few of the more curious cases.

The courts in North Carolina seem singularly insensible to the charms of music. In *State* v. *Baldwin* (1 Dev. and Bat. 195), it was held no nuisance to curse and swear so loud at a tavern as to break up a singing school near by. It is a very improv-

ing mental exercise to read a syllabus, and then, closing the book, try to imagine on what grounds the court places its decision. For instance, in this case, I imagined that, perhaps, the court held the cursing and swearing to be the legitimate and ordinary use of the tavern property, of which the owner could not lawfully be restrained. Or, perhaps, the quality of the music had something to do with the decision, for it must be admitted that poor singing is almost as bad as profanity. Indeed, might it not have been its bad quality, grating on the cultivated and sensitive ears of the tavern guests, that caused their profanity, as certain sounds of the gamut are said to cause dogs to howl? Was the singing religious or secular? Even if religious, have we not Falstaff's testimony that he had spoiled his voice with singing of psalms? But now, opening the book, see how mistaken we have been, and how, except in the last conjecture, we have not even approached the real ground of decision: "Its interruption"—that of the singing school—"cannot be legally pronounced an inconvenience to the whole community. The loss of instruction in the accomplishment, to those who would fain acquire it, does not very gravely influence the good order or enjoyment or convenience of the citizens in general, so as to call for redress on the complaint of the State." That is to say, as corporations have no souls, so the State has no ears. But further: "If we sustain this as an indictment for a common nuisance, we shall be obliged to hold that whenever two or more persons talk loud, or curse, or quarrel, in the presence of others, it may be charged that this was done

to the common nuisance, and if so found, will warrant punishment as for a crime." The judge is, perhaps, sound here; such a doctrine would involve even the abolition of our National Congress — a calamity at which every good citizen would stand aghast. And yet, in Pennsylvania, they held that the offense of being a common scold is indictable, and may be punished by fine, or fine and imprisonment, at discretion. *James* v. *Commonwealth* (12 S. and R. 220). But the judge winds up thus: "The persons disturbed are not represented as having been engaged in the performance of any public duty — as engaged in religious worship, attending at any election, or at a court." Here, perhaps, was the defect in the prosecutor's case; he should have proved that the singing school were practicing hymn tunes. I fear that this case indicates something rotten in the State of North Carolina. Did not Shakespeare say:

> "The court that hath no music in himself,
> Nor is not moved by concord of sweet sounds,
> Is fit for treason, stratagems, and spoils.'

And does not the late national "unpleasantness," taken in connection with this decision, bear out the poet's idea? But as the old pine-wood commonwealth has in vain struggled for liberty, "and the sounding aisles of her dim woods" cannot "ring with the anthems of the free," she is determined that they shall at least ring with those of the "free and easy." Quite possibly it would there be held a nuisance to sing so loud as to break up the cursing and swearing at a tavern near by.

Another case to which we would call attention is *State* v. *Linkhaw* (69 N. C. 214). The defendant was indicted for disturbing a religious congregation. He was a strict member of the Methodist church, and a man of exemplary deportment, but he sang in such a way as to disturb the congregation. The disturbance consisted partly in his holding on the notes after the other singers had let go. He was evidently trying to realize Milton's idea of "linked sweetness long-drawn out." This disturbance was decided and serious; "the effect of it was to make one part of the congregation laugh and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." Once the preacher had shut up the book and declined to sing the hymn. The presiding elder had refused to preach in the church on account of the disturbance. On one occasion, "a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing," and he then refrained. On many occasions the church members and authorities expostulated with him on account of his singing and its disturbing effects, but he invariably replied, that "he would worship his God, and that as a part of his worship it was his duty to sing." One of the witnesses, being asked to describe his singing, sang a verse in his voice and manner, which "produced a burst of long and irresistible laughter, convulsing alike the spectators, the bar, the jury, and the court." The jury found him

guilty, but this was reversed because there was no proof or pretense of any intention or purpose to disturb the worship, but on the contrary it was admitted that he was conscientiously taking part in the religious services, and doing his "level best." Now this was a serious case. The offender was a member of the church in good standing, and there was no fault in him save the eccentric character of his vocalization. But it must have been a harrowing reflection to his fellow church members that he was to be saved, and that they were bound to listen to that singing through all eternity. Those jealous brethren must try some other course. If they had come to me originally, or dropped me a line, I could easily have managed the matter for them. I should have said to them, just induce Brother Linkhaw to embrace the ministry, and then he will have to "rotate." I must confess, however, that I am puzzled by the admission in evidence of the imitation of the defendant's style of singing. It was not a photograph, nor an exemplified copy, nor a contemporaneous memorandum, nor a deposition *de bene esse*. How was it brought up on appeal? It was in no sense an exhibit, and could not have formed a part of the record. Perhaps, as is sometimes done in our appellate courts in the case of cumbrous articles of evidence, like the cellar door on which the man kept his accounts, it was produced extraneously and *dehors* the record on the argument. Perhaps the witness repeated his imitation on the hearing of the appeal. In that case I should suppose the judge who delivered the opinion would have indulged more in the humorous,

and not have limited his observations to the common-place: —"It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the courts." Besides, I think he is rather a proper subject for the discipline of that singing school which was the disturbed party in *State* v. *Baldwin*.

In this connection it may be observed that cursing and swearing, to a moderate and reasonable degree, is not a nuisance. To constitute such profane cursing and swearing as would be indictable as a nuisance, the acts must be so repeated and so public as to become an annoyance and inconvenience to the community. The law is not so harsh as to deem it a nuisance publicly to curse and swear for the space of two hours. *State* v. *Jones* (9 Ired. 38).

But the law, although indulgent, cannot stand every thing, and so the keeping in a public house of "a certain common, ill-governed, and disorderly room," and procuring and suffering, for lucre, disorderly persons to meet and remain therein by night and by day, "drinking, tippling, cursing, swearing, quarreling, making great noises, rolling bowls in and at a game commonly called ten-pins," etc., *is* a public nuisance. *Bloomhuff* v. *State* (8 Blackf. 205).

One would think that the North Carolina lawyers deemed courts and elections religious assemblages. Thus, in *State* v. *Kirby* (1 Murphy, 254), an indictment was sustained which alleged that the defendant "swore *several* oaths in the court yard during the sitting of the court, to the great disturbance

and common nuisance of the citizens attending said court." The idea suggested in this case and in *State* v. *Baldwin*, that citizens are peculiarly apt to be annoyed by profanity while attending court or election, seems rather fanciful. That they are more apt to be guilty of it at those times may be admitted. But the law ought to be lenient toward human frailty, and consider the provocation of an unexpected nonsuit, or the dereliction of a pledged elector, as going far to excuse unpremeditated profanity.

In *Illinois Central Railroad Co.* v. *Grabill* (1 Freeman, 241), which was an action brought by Grabill to recover damages for the disturbance of her enjoyment of her premises caused by the maintenance by the railroad of cattle-pens and hog-pens near the same, it was held that the shouting and noises made by those having charge of the stock could not be regarded as an element of damage, for the drovers "were not in a position to be controlled by the company or their agents. Should they, as they doubtless did, outrage the decencies and proprieties of life, the company could not be held responsible, not having this control." The railroad company could not compel the hog-drivers to address their charge in a whisper. What the court would have held, if the drivers had cursed and sworn at the hogs, does not appear; although it is probable that this would have formed a proper element of damage.

It is perhaps doubtful under what category *Commonwealth* v. *Taylor* (5 Binney, 277) ought to be classed, but it is digested under Nuisance. The de-

fendant was indicted for "that he, on the 24th of August, 1809, about the hour of ten of the clock in the night of the same day, with force and arms, at Lurgen township, in the county aforesaid, the dwelling-house of James Strain there situate, unlawfully, maliciously, and secretly, did break and enter with intent to disturb the peace of the commonwealth; and so being in said dwelling-house, unlawfully, vehemently and turbulently did make a great noise, in disturbance of the peace of the commonwealth, and greatly misbehave himself in the said dwelling-house; and Elizabeth Strain, the wife of the said James (not the commonwealth now), did frighten and alarm, by means of which said fright and alarm she, the said Elizabeth, being then and there pregnant, did, on the 7th day of September, in the year aforesaid, at the county aforesaid, miscarry, and other wrongs to the said Elizabeth then and there did, to the evil example," etc.

The defendant tried to escape punishment on the ground that this was a "crime without a name," but the court thought it a misdemeanor notwithstanding. Counsel cited several cases where indictments had been supported for similar injuries. Thus, a great noise with a speaking trumpet, to the disturbance of the neighborhood, is a nuisance. *Rex* v. *Smith* (1 Stra. 704). So, too, where the defendant unlawfully and violently knocked at the door of the prosecutor for two hours, whereby his wife was frightened and miscarried. *Rex* v. *Hood* (Say. 167). So, too, where the defendant unlawfully entered a house, and "committed a nuisance" on the floor, in presence of the prosecutor's wife.

Rex v. *Rollo* (Say. 158). Chief Justice Tilghman went for punishing the defendant, because "the malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors." Judge Yates, too, said "human prudence cannot guard against such outrageous and unlawful acts as are here stated." But Judge Brackenridge, in combatting the doctrine that the conduct complained of was a mere private injury, waxed learned, eloquent, and metaphysical, insisting that an assault might be committed by the concussion of air produced by speech:

"But taking the entry to amount to nothing more than a walking in, the door open, may not the motive of his entry, and the use he made of it, constitute a misdemeanor? What is he alleged to have done, after entering the house? 'Willfully, vehemently and turbulently did make a great noise.' How is a noise occasioned that is perceptible to the ear? It must be by an impulse of the air on the organs of hearing. And what is it, whether it is by the medium of air, or water, or earth, that an assault and battery is committed? The impulse of the air may give a great shock. Birds have fallen from the atmosphere struck by a mighty voice. "This happened at the celebration of the *Isthmian* games, as related by Plutarch in his life of Paulus Emilius. Are we bound to consider the noise gentle? Are we not at liberty to infer the mightiest effort of the human lungs? But the power of imagination increases the effect. Armies have been put to rout by a shout. The king of Prussia, in the seven years' war, won a battle by the sound

of artillery without ball. Individuals have been thrown into convulsions by a sudden fright from a shout.

"The infant in the womb of a pregnant woman has been impressed with a physical effect upon the body, and even *upon the mind*, by a fright. Mary Queen of Scots, from the assassination of Rizzio, communicated to her offspring the impression of fear at the sight of a drawn sword. Peter the Great of Russia had a dread of embarking on water from the same cause. Shall we wonder, then, that death is occasioned to the *embryo*, in the womb of a pregnant woman, by a sudden fright? If, in this indictment, it had been stated that the woman was pregnant with a living child, it might have been a homicide. But she is stated to have miscarried, which is the parting with the child in the course of gestation. Will not the act of the individual maliciously occasioning this constitute a misdemeanor? A sudden fright, even by an entry without noise, presenting the appearance of a specter, might occasion this, even though in a playful frolic; yet, after such effect, would not the law impute malice? No person has a right to trifle in that manner to the injury of another."

Rope-dancing was a nuisance at common law. This was decided by Lord Hale in *Jacob Hall's Case* (1 Mod. 76). Jacob was a rope-dancer of the time of Charles Second, and on account of his beauty and activity, had been taken into favor by th Countess of Castlemaine, one of Charles' mistresse Hall being about to erect a stage at Charing-cro to exhibit his performance, the king's bench, pe

haps inspired by the king's excusable jealousy of Jacob, held Jacob to be a nuisance in respect to his rope-dancing. That he claimed to have the king's warrant for it made no difference. If Charles had proposed to make Jacob dance at the end of a rope, perhaps the court would not have interfered. It is not a little amusing that so acute a man as Judge Cowen should have attributed the conduct of the court on this occasion to the national respect for law and order. In *Tanner* v. *Trustees of Albion* (5 Hill, 128), commenting on this case, he observes: "Surely, we have not come to an age when the morality of the law is relaxed beyond what it was in the reign of Charles the Second, the date of Hall's booth, erected, as he said, by license from the king. This was a very probable account. Charles was known to be the most careless in his moral conduct of any man in his kingdom, and to keep a court which was abandoned to all sorts of licentiousness. The Duke of Buckingham, his principal adviser, was said himself to have been a rope-dancer. It is not very likely that a king whose palace was distinguished for being the largest brothel in Europe, and who is known to have dismissed Lord Clarendon on the joint advice of Buckingham and the Duchess of Cleveland, a prostitute, would hesitate to license any vicious establishments for which such courtiers might invoke his patronage. The rule of the common law becomes more evident, and the precedent referred to more imposing, when thus placed in contrast with the moral waste by which it was surrounded." The judge's innocence is more

easily understood, when he confesses, in the same opinion: "I do not remember ever having seen a game of billiards played, and am still farther removed from actual knowledge whether the rooms where they are kept have a tendency to promote any kind of moral evil."

The case of *Tanner* v. *Trustees of Albion* was one in which the court held a bowling alley, kept for gain or hire, a public nuisance. As far as an *obiter dictum* could do it, Judge Cowen frowned down billiard-rooms in the same opinion. "Were the question *res nova*," he continues, "I doubt whether I could bring myself to join in the annunciation that a billiard-room, kept for lucre, in whatever place, is not a nuisance at common law." Doubtless the good judge's bones are rattling in their grave with horror at the present unrebuked prevalence of billiard saloons. The case that he was driving at was probably *People* v. *Sergeant* (8 Cowen, 139), where it was held that keeping a billiard table, where no betting was allowed, but where the loser of the rub paid for the use of the table, was not a nuisance at common law. Life, with Judge Cowen, "meant business." He allowed no fooling. "So far as I have been able to discover," he says, "erections of every kind, adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become matter of general observation, when gainful establishments are allowed for their promotion,

such establishments are usually perverted into nurseries of vice and crime." Now, is it not fortunate for me that the great judge is not in being? For these "humorous phases of the law," being designed for sport and relaxation, and "having no useful end," if I should print and bind them in sheep and offer to sell them to my brethren of the legal profession, would he not come down on me, call me and the book a nuisance, and enjoin us? His idea amounts to this: the moment a man undertakes to make a *profit* by furnishing public facilities for the pursuit of a harmless and healthful sport, that moment he becomes a nuisance. He is then held to have gone into the "nursery" business, to use the judge's language, and is to be suppressed.

Rex v. *Medley* (6 Carr. and Payne, 292) is a case fit to make Isaac Walton "go off the hooks." The indictment alleged "that from time whereof the memory of man runneth not to the contrary, there had been, *and still was,* a certain *ancient* river called the Thames," which was full of water fit to drink, and of fish fit to eat, the taking of which fish furnished the support of a large class of men; that the defendant had conveyed into said river the refuse of gas, whereby the water was rendered unfit for drinking, and the fish were destroyed, and the fishermen were damaged in their said calling. It was proved that the smell of the gas killed the smelts in the stream. But the court, who was probably not fond of fishing, remarked: "If the diminution of fish is to be considered the criterion, then every proprietor of a copper-bottomed vessel, every maker of a sewer, every proprietor of a steam-

boat, must be found guilty, as they contribute to such diminution, and it is not a question of degree." "As the people of England are resolved to have gas-lights, and steamboats, and copper-bottomed vessels, they must be content also to bear the inconveniences which will occasionally result from the use of them."

The public is very slippery. It is hard to lay hold of. It has been repeatedly held that works maintained or acts committed by legislative or other public authority cannot be deemed nuisances. *Harris* v. *Thompson* (9 Barb. 364), and cases cited. But how, if the legislature itself be generally considered a nuisance?

In *Gilbert* v. *Mickle* (4 Sandf. Ch. 357), it was held that a placard posted or paraded in a public street, before the door of an auctioneer, cautioning strangers to beware of mock auctions, constitutes a nuisance remediable by injunction; and although, as it appeared that this was done by direction of the mayor, under authority of a statute, an injunction was refused, yet the court intimated that if the complainant were innocent he might have a remedy at law, or, at worst, by an appeal to the legislature to abolish the obnoxious statute. To say that a man's lawful business could be broken up by such an act, and he be left substantially remediless, seems a mockery of justice, and would justify the auctioneer in knocking down the intruder.

Again, as it is not lawful to post a person in the street to warn away a crowd from an individual's premises, so it is unlawful to station one to attract a crowd to a person's premises, to the inconvenience

of the traveling public. It is even unlawful for a person so to conduct on his own premises as to attract a crowd upon the sidewalk so as to obstruct the public passage. So it was held in *Rex* v. *Carlile* (6 C. and P. 627), that if a party having a house in a street, exhibits effigies at his windows and thereby draws a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass, as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libelous. Mr. Carlile was a gentleman of a playful but withal rather satirical fancy, who kept a book shop. Having been distrained on for the non-payment of a church rate, he placed in one of his windows an effigy of a bishop of the established church, inscribed "Spiritual Broker," and in another window a figure of a man in ordinary dress, inscribed "Temporal Broker." These figures attracted crowds of people to gaze at them, on Sundays as well as secular days, and the sidewalks were obstructed so that persons were forced to walk in the carriage-way. The defendant afterward added a third figure, that of the devil with a pitchfork, the arm of the bishop being tucked into that of the devil. He was indicted separately for the original effigies and for the satanic addition. It was proved that pockets had been picked in the crowd. Mr. Harris, a neighboring tradesman (the husband, possibly, of the fabulous "Betsy"), swore that the crowd consisted of "the lowest of the low" — so low in fact that they had lowered his cash receipts 3*l.* per day. Mr. Chandler, proprietor of the Portugal hotel, opposite

defendant's shop, testified that the crowd standing over his area gratings darkened his kitchen so that the servants were obliged to burn candles all day; an injury which of course would be naturally uppermost in the mind of a chandler. Against this array of government, church and trade, Mr. Carlile defended himself with great humor and ability, pleading his own cause. He urged that no man should be blamed for endeavoring to attract people to his shop. He insisted that the crowd was not so great as that when his majesty goes to the theater or to open Parliament; and inquired, "why do we pay for situations and disburse large sums of money annually in Fleet street, if it is not to have the opportunity of putting things in our windows to attract the attention of the customers?" He claimed that Mr. Gray was as fairly indictable for obstructing the street by means of his coach office. He referred to the two effigies formerly at St. Dunstan's church, which struck the quarters of the hour, attracting crowds every fifteen minutes, and complained that he was indicted for causing seventy persons to look at his effigies. "I would ask," he continued, "why ought not the Lord Mayor to be indicted for the crowd that he attracts on the 9th of November every year? and if Bartholomew Fair is allowed in September, I ought not to be indicted for exhibiting effigies in October; and so far from there being any thing necessarily improper in effigies, the figures of Gog and Magog used to be carried in the civic procession. It is said that the effigies exhibited by me are libelous. They are fair figures, and as good as I could have made; one of them is a fair

representation of a bishop; and they were meant to denote that the church, which is represented by the bishop, is not supported voluntarily, but by the law, which is represented by the broker." At this point, the reporter observed, rather acutely, that "Mr. Carlile did not, throughout his defense, make any remark or observation on the figure of the Devil." Mr. Carlile continued, that illuminations, military movements, and the learned judges when they go in state to St. Paul's, all attract crowds, and concluded by remarking that if his offense was indictable, "the beautiful daughter of Mr. Very might equally have been charged with being an indictable nuisance." This reference is explained by the reporter, who says that Mr. Very was a confectioner in Regent street, who had a daughter who attended to his shop, who was so beautiful that a crowd of three or four hundred persons used daily to assemble and stand at his shop window for the purpose of looking at her. Police officers were obliged to be in constant attendance before his house, and the inconvenience was so great, both to Mr. Very and his neighbors, that he was obliged to send his daughter out of town. But all this availed not to the defendant. Judge Park replied that one nuisance does not justify another, and in this, he remarked, "the learned persons who sit beside me agree with me." He evaded the case of the prosecution of the judges by saying that the crowd move with it. Lord Mayor's day is but one day in the year, but if it lasted from October to December, he should say it ought to be put a stop to. As to Bartholomew Fair being a nuisance, he

was inclined, from what he had heard of it, to suspect that the defendant was right. (Perhaps the learned judge did not know that John Locke visited that place, and that Lady Rachel, "that sweet saint who sat by Russell's side," and whose memory ought to be sacred to every lawyer, once wrote her husband that her sister had just returned from Bartholomew Fair, and "stored us all with fairings.") The jury brought the defendant in guilty, sentence was suspended, he took down the offensive figures, and in the end was fined 40*s*. Now what can the ladies hope for after this case? It is even doubtful, we see, whether their beauty would save them, for if the beautiful Miss Very had remained in town dealing forth the sweets of her father's shop, we rather think something would have been devised to keep the streets clear.

A very recent case on this subject is *Fairbanks* v. *Kerr* (70 Penn. 86; 10 Am. Rep. 664). Mr. Fairbanks, feeling inspired to make a political speech, and not finding any eligible stump, mounted a pile of flag stones belonging to the plaintiff, and proceeded with his address. A crowd assembled, and in their eagerness to array themselves upon the speaker's platform, some of them standing upon several of the projecting stones, broke them. The court held that the act of making a speech in a public street, although not a nuisance *per se*, may become a nuisance by obstructing the public highway, and that in this case the question whether the defendant's act was the proximate cause of the injury, was for the jury. The judge observes: "A street may not be used in strictness of law for public

speaking, even preaching or public worship; or a pavement before another's house may not be occupied to annoy him."

It is gratifying to learn that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding-house, is not a nuisance. *Boom* v. *Utica* (2 Barb. 104) holds this, and illustrates the ceeliness of the public. The plaintiff was lessee of premises from the defendants, at an annual rent of $10. Without his consent, some aldermen, who, he claimed, acted under authority of the defendants, put into an old house on the premises a family sick with the small-pox, removing them from a hotel, under the sanction of the city charter, which authorized the abating and removing of nuisances. The plaintiff was prevented from the enjoyment of the lot, for the purpose of pasturage and cultivation, because it was deemed dangerous to approach the house under the circumstances. Perhaps he feared that his cows would take the disease. A referee gave him $75 damages. The report was set aside on the grounds that the common council had no power to authorize the act complained of, and never, in fact, did authorize it. But the court intimate that the city's agents did wrong in taking the family from the hotel, and in this connection hold that being sick of small-pox at a hotel does not render one a nuisance subject to "removal." Jennerally this doctrine will be approved.

But a person is indictable for "unlawfully and injuriously carrying a child infected with small-pox along the public highway." *Rex* v. *Ventandileo* (4

M. and S. 73). This must be on the ground that it is unlawful to set a nuisance on foot.

What would the gentle author of "The Village Blacksmith" say, if he knew that it had been deemed necessary to decide that a court of chancery would not restrain the erection of a blacksmith's shop in a small village, on the averment that it would be a nuisance from the danger of fire which it would create? But this was done in *Ray* v. *Lynes* (10 Ala. 63). It is quite possible that the chancellor's judgment was influenced by his recollection of the picture drawn by the poet:

> "And children, coming home from school,
> Look in at the open door;
> They love to see the flaming forge,
> And hear the bellows roar,
> And catch the burning sparks that fly
> Like chaff from the threshing floor."

And the poet, in return, would say:

> Thanks, thanks to thee, my worthy judge,
> For the lesson thou hast taught;
> In no contempt of poesy
> Are your decisions wrought;
> At length I find one lawyer
> Who's not a nuisance thought

THE IDIOCY OF MARRIED WOMEN.

THE metamorphosis which marriage works upon woman is one of the funniest phases of the law. I speak of the common law, unaffected by any of the recent statutes which have wrought such radical changes in the marital relations. The discontented ladies who deliver public lectures do not see much fun in this. To them, the process by which, contrary to the operations of nature, the beautiful butterfly of the single woman degenerates into the grub of the wife is a hideous reality. But to me there is something ineffably funny about it. A man will sigh and fawn around a woman for a term of years, celebrate her unparalleled virtues and wisdom in bad verses, lose flesh and spirit if she frowns, kneel to her as the Hindoo to his idol, and grovel in utter abasement before her conceded superiority; and then, when he is permitted to put the wedding ring on her finger, as if by magic change, she grows imbecile and idiotic, unable to act and judge for herself; loses her right to control her property or earnings, and becomes, like an infant, utterly irresponsible for every thing she may have said or done. No, not every thing; if she has done any thing worthy of prison or hanging, the law deems her of sufficient mental capacity to answer for that, but adjudges the husband the vicarious sufferer for every thing else. What a fall from

> "A perfect woman, nobly planned,
> To warn, to comfort, and command!"

It would seem that some commentator during all these ages would have been struck by the absurdity of this state of affairs. But, as to one in a dream, the most ridiculous occurrences seem consistent and natural, so among the law-writers this phase of law has never, until very recently, excited any surprise, but has been spoken of as gravely as the monks of the middle ages narrated the legends of the church. In regard to this miraculous metamorphosis, however, Byron, in a new edition about to be issued by Mrs. Stowe, with adaptations for family reading, will probably cause Childe Harold to observe:

> The tune is changed; and such a change! oh law
> And legislators, ye are wondrous strong!
> And ugly in your strength as was the jaw
> Of ass in hands of Sampson; far along
> From page to page, the sheep-clad books among,
> Sticks the huge blunder; not in lonely bravery,
> But every sage repeats the hardy wrong;
> And only Schouler comments on the knavery
> Of Coke & Co.'s belief in woman's slavery.

But, funniest of all, the husband does not seem conscious of the degeneracy of his idol. If, on the morning next succeeding his wedding night, he should find his blonde bride converted into a black-amoor, we can imagine that he would let the world hear of it. But to discover that the partner of his bosom and the prospective mother of his children has, in one night, become an irresponsible and unjudging idiot, does not disturb his composure a whit. Marriage has elevated him from the attitude of suppliant into that of a sovereign. He is now, says the law, *dignior persona*. Let us imagine this

superior person before marriage thus addressing the young lady, whose golden, raven, or ruby hair (as the case may be) rests confidingly on his manly shoulder: "My heart's adored, I know the law sets me a hard task, but, for your sweet sake, I do not shrink. Your property will become mine, it is true, and you will be dependent on my bounty for every penny that finds its way into your purse; if you make any money by embroidery, or music lessons, or keeping boarders, that, too, will be mine; and if any of your relatives should hereafter will you any thing, I shall be forced to confiscate that also. But just see, my only love, what a price I must pay for these insignificant privileges. As you have had a rich and indulgent father, of course you have contracted numerous debts; these I must cancel. You know, my sweet, you have a violent temper and enormous muscular power, and have been guilty of a great many slanders and assaults and batteries; after we are married, I may be mulcted in damages for these. You see what risks I run. I don't know that you have ever murdered anybody; but if you have, the law generously permits me to make an exception in your favor, and allow *you* instead of myself to be hanged, and I do it with my whole heart." By such a declaration the young man would probably not greatly commend himself to the young lady; and yet, if she should go to her legal adviser, he would instruct her that such is the theory of the law. And as Mark Tapley would say, "Isn't this jolly?"

This idiocy of the wife is probably founded on the maxims of Noy, Selden, and those other humor-

ists who laid the foundations of our laws. Noy says: "All that a woman hath appertaineth to her husband;" "The will of the wife is subject to the will of the husband." And good old Selden takes even a more pleasant view of these matters. He says: "'Tis reason a man that will have a wife should be at the charge of her trinkets, and pay all the scores she sets on him. He that will keep a monkey, 'tis fit he should pay for the glasses he breaks."

But lest we should grow serious over this topic, and render ourselves the prey of the strong-minded of the fair sex, let us refresh ourselves with two or three cases illustrative of the doctrine which we have stated.

The husband is civilly responsible at common law for the wrongs of the wife committed before marriage. He takes her as one buys an unwarranted horse, with all her faults. She may prove kind in harness, or she may not. This doctrine is treated with exquisite satirical humor by Judge Brackenridge in *Hawk* v. *Harmon* (5 Binney, 47). This case decides that an action will lie against husband and wife for slanderous words spoken by the wife before marriage. In respect to this class of cases, it must be observed that if the husband should die before the verdict, the wife, being restored to her state of moral responsibility, continues alone liable. But let us listen to this funny judge: "It would certainly be a circumstance favorable to the entering into the marriage state, and 'a consummation devoutly to be wished,' on the part of females, if it afforded them a sanctuary from

all by-gones of defamation, or other wrongs to society; * * * it might facilitate the leading to the altar, in a case where a young lady had indulged herself more freely than was strictly justifiable in a conversation, or had transgressed the grounds of a *molliter manus imposuit*, and committed an assault and battery. "It is impossible for me to say that on espousal a damsel is not taken with all her slanders on her head, and all her trespasses, and that the *baron* is not answerable." "Nor do I know that it can well lie in the mouth of the baron to complain, since he cannot but be considered as a party to the act of her withdrawing on her part, and the taking shelter under the marriage state; more especially in the action on the case for a breach of promise of marriage; because the successful lover cannot but be considered as a party to the *fædifragium*; for it cannot but be presumed that but for him there would have been no jilting." "In all affairs of human life, the sweet and the sour must be taken together; *qui sentit commodum, sentire debet et onus*. According to the marriage ceremony, she must be taken for better or worse; though I will not say that in drawing up the form there was a reference to this principle of law; but the words are broad enough to comprehend it, and it would look like a subtilty to explain away and exempt it. But the notion of marrying a lady in her shift, free from incumbrances, may be set down among vulgar errors. The law being settled on this head, if there was any doubt of it before, it may lead to greater caution, and put the inexperienced upon inquiry as to the conduct of the *ina-*

morata before the nuptials; and may lead the female to a single attention to her morals, as wrongs and breaches of the peace may prevent her matrimony. It is true, the husband may with more propriety call her his *dear* wife, if some of the draw-backs should come upon him, and with a safe conscience he may use the term as an *equivoque*, even if his affections should not be the strongest after marriage. By the common law, also, it is allowable to give due chastisement, which, I take it, may extend to what was done before marriage as well as after, and to take personal satisfaction; though on this head I will not undertake to be as clear as I am on the principal point."

(This case is so irresistibly humorous that Mr. Schouler, it seems, deemed it unworthy of insertion in a serious law book, and omitted it from his excellent work on the "Domestic Relations.")

The law recognizes the inability of the wife to judge of what is best for herself to eat and drink, and will punish, by damages awarded to the husband, any one who takes advantage of her idiocy in this respect. This principle is well illustrated in the case of *Hoard* v. *Peck* (56 Barb. 202), in which it was held that an action can be maintained by a husband against a druggist to recover damages for selling to the plaintiff's wife, secretly, from day to day large quantities of laudanum to be used by her as a beverage, and which are so used by her to the defendant's knowledge, without the knowledge or consent of the husband; the defendant well knowing that the same was injuring and impairing her health, and concealing the fact of such sales and

the use thereof from the plaintiff; in consequence of which use by her the wife became sick and emaciated, and her mind was affected, so that she was unable to perform her duties as such wife, and her affections became alienated from her husband, and he lost her society, and was compelled to expend divers sums of money in medical and other attendance upon her. This is truly a righteous decision. Let the apothecaries look out for themselves. If this cause is sustained,

> "Not poppy, nor mandragora,
> Nor all the drowsy syrups of the world,
> Can ever med'cine them to that sweet sleep
> Which yesterday they owned."

Next, we shall come down on them for selling our wives patent medicines and female specifics. Then we shall extend the doctrine as against other trades and occupations. The corset-maker shall suffer, and the shoemaker who puts small heels on our wives' boots. In those States where lotteries are lawful, let the lottery dealers beware of selling too many tickets to married women. I am by no means certain that the doctrine may not be reasonably invoked against revival preachers, who drive weak women mad by powerful discourses, and against the advocates of woman's rights, who alienate our wives' affections from us by holding up the glittering prospect of the ballot. What, then, shall we say of that wretched Judge Morgan, who dissented from the opinion of the majority in this case? He said: "The defendant was guilty of violating no law in selling her the opium." "The wife was

under no legal restraint, nor could she be put under any legal restraint, not to use opium. If there was any way known to the law to enforce the social and moral obligations which the husband owes to the wife, or the wife to her husband, in respect to the use of hurtful stimulants, there would be more occasion for wives to restrain their husbands, than for husbands to invoke the aid of the law to restrain their wives." "A wife nas no legal control over her husband, nor has he any legal control over his wife if she chooses to indulge in the improper use of opium." "The plaintiff's wife was responsible to no human tribunal for her conduct." "There is in this country, where the ancient chivalry never literally prevailed, an increasing tendency in the law to look upon a woman as a being possessed of a human soul, like man, and accountable like him to a higher power." "The wrong in this case, if it could be regarded as a legal wrong, was committed by the wife of the plaintiff, and not by the defendant." And various other unfeeling remarks quite at variance with the sentimental and imaginative morality of his brethren. To be sure, it is difficult to see how an action will lie for depriving the husband of that which, under our laws, he is no longer entitled to demand against his wife's will, viz.: his wife's society and services; but, probably the gist of the action was the "emaciation." I know of no law justifying any one in depriving the husband of his due proportion of conjugal avoirdupois. The scales of justice cannot be put to better use than in ascertaining the amount of the husband's loss in this regard, and the verdict should be regulated by the

degree of corporeal depletion. But let Judge Morgan beware. He may be a very good man as judges go, but if he persists in uttering such absurd and revolutionary sentiments as the above, it is possible that he may disappear like that gentleman of the same name, who incurred the hostility of the masons a generation ago.

But it seems that the law does not recognize the maxim, "what is sauce for the goose is sauce for the gander." The husband has an action against third persons for depriving him of his wife's society and services, but the wife has no corresponding action. If a wife has a drunken husband who beats her, and whom she supports, and she, by the aid of a "true apothecary," seeks to drown her sorrows in opium, the husband has an action against the apothecary therefor; but the wife, at common law, has no action against the rumseller who debauches her husband and deprives her of his "society and services."

This doctrine is capable of further extension. Admitting that the wife has no legal claim to the husband's society or services, still, the husband, as we have seen, is civilly responsible for his wife's debts contracted and wrongs committed before marriage. The wife has a right to rely, in forming her matrimonial schemes, on this responsibility. Has she not, therefore, an action against any one who impairs it — ought she not to have, I mean? Let us imagine a case: Jane owes a debt; she marries John; the creditor sues them both; on account of this trouble, John falls into dissipated courses at a neighboring tavern, and pending the action he dies

of *delirium tremens;* Jane is now alone liable; judgment proceeds against her, and she has to pay it. Now, had it not been for that tavern-keeper, John would not have got drunk, nor died pending the action, but judgment would have been enforced against his property. Jane has thus suffered a pecuniary wrong at the hands of the tavern-keeper. Ought she not to have an action against him? Decidedly she ought, if this opium case is to be sustained, on the principles of matrimonial comity.

It has been argued that it is a mercy to persons accused of crimes to prohibit them from testifying on their own behalf; for if they cannot testify, they cannot hurt themselves. The same tenderness would prohibit the Californian miners from carrying rifles to keep off the bears, lest now and then they might kill themselves with their own weapons. On a like principle, it must be admitted that the idiocy of married women is frequently beneficial to them; as, for instance, in those cases of criminal accusation where the law presumes that they acted under compulsion of the husband. This reasoning, however, would apply all the more strongly to them, if they were judicially declared incompetent, and placed under the charge of custodians. And yet, perhaps, it would hardly be desirable to do this. The point is full of difficulty. A case illustrating the principle spoken of is *People* v. *Townsend* (3 Hill, 482), which held that a married woman does not know enough to commit a nuisance on her own land. "During coverture, the husband has the control of the wife's estate, and if he creates

a nuisance on her land, she cannot be made to answer criminally for the offense."

We see, then, how tender and considerate the common law is toward married women. It regards them as adult babies. How foolish of the women to ask to be emancipated from this state of pleasant irresponsibility! No doubt, after a few more years' experience of the married women's acts so much in vogue, our wives will be coming back and beseeching to be re-instated in their happy thraldom, just as the southern bondmen, who, during the days of negro slavery in this country, were emancipated by the mistaken kindness of their masters, were certain to return in a little while begging for the cat-o'-nine tails and pickle. And how grateful wives ought to feel toward their husbands at common law, and how sorry when they are gone! I dare say they do, and that if we would allow them, there would be a general rush on the part of widows to immolate themselves on the funeral pyres of their deceased lords. How wicked, then, of Mr. Schouler, in speaking of the common-law obligation of widows to bury their deceased husbands, to say: "Why, it may be asked, should a woman answer for the indigence of one whose lawful privilege it was to strip her of her own means of support?" Nor can we understand the court in *Chapple* v. *Cooper* (13 M. and W. 252), when, in speaking of the same obligation, they put it on the ground that the burial is "a benefit and comfort to herself." Surely, they cannot mean to insinuate that a common-law wife would take pleasure in attending the funeral *of* her husband!

THE ECCLESIASTICAL COURTS.

THERE is no reading more humorous than the reports of the ecclesiastical cases, as given in the columns of the *London Law Journal* reports by those facetious gentlemen, George Henry Cooper and George Callaghan, Esquires, barristers at law. We have nothing like them among ourselves, owing to the infidel separation of church from state, which prevails to some extent in this country. Let it not be understood, however, that we are without the blessings of ecclesiastical councils. We have them, but they are a law unto themselves, and our law courts are forced to get on as well as they can without the presence or countenance of the clergy. Perhaps our immunity is not to be regretted, for of all the assemblies of mankind upon the face of the earth, from the earliest days down to the present time, the most reckless and disregardful of the laws of God and man is an assembly of clergymen. An assembly of women is conservative in comparison. Even a moot court of school boys has more regard for the rules of evidence.

The recent advent of ritualism in the English church has given rise to considerable interference on the part of the ecclesiastical courts, and I am not sure but that it has demonstrated the utility of such institutions. It is certain that a court of law cannot be imposed on by such evasions as would

succeed in a clerical court; and it is controlled by legal rules of evidence and interpretation. Consequently those English clergymen who have lately gone into the millinery business, and have been evincing an undue fondness for the ways of the scarlet woman, are having a hard time of it before the Lord High Chancellor and those other lords who constitute the privy council, to say nothing of the clear and inexorable logic of Dr. Phillimore, dean of the court of arches.

The Reverend Alexander Heriot Mackonochie, clerk in holy orders in the church of England, and incumbent of the parish of St. Albans, seems to be a tough customer. He was charged by a roundhead fellow, named John Martin, with having, during the prayer of consecration in the order of the administration of the holy communion, knelt or prostrated himself before the consecrated elements, and also, with using lighted candles on the communion table during the celebration of the holy communion, when such candles were not needed for the purpose of giving light; also, with elevating the paten and the cup above his head, with using incense, and with mixing water with the wine. The court below "monished" him in respect of all these enormities, save the kneeling and the candles, but declined to give costs. 37 L. J. R. (N. S.) Ec. Cas. 17. From the refusals to monish, the puritan Martin appealed to the privy council, mainly, it is to be suspected, on the question of costs. The report of the decision on the appeal is full of good reading. 38 L. J. R. (N. S.) Ec. Cas. 1. The court held, first, that the priest is intended by

the rubric to continue in one position during the prayer of consecration, and not to change from standing to kneeling, or *vice versa;* and that he is intended to stand and not kneel. Second, that the candles, as a ceremony, are unlawful, having been abrogated. Thirdly, that the lighted candles are not ornaments, within the meaning of the rubric. Counsel struggled hard for the candles, claiming that they had been used ever since the year 1100, but the court held the doctrine of ancient lights inapplicable to the case. And their lordships, with due regard to the dignity of the law, advised Her Majesty that the clergyman should pay the round-head's costs.

One would suppose that the Reverend Alexander Heriot Mackonochie was now pretty stringently tied up, but "for ways that are dark and for tricks that are vain," this particular clergyman is "peculiar." He ceased to "elevate the elements above his head," but merely elevated them as high as his head; he put out the candles just before communion, still allowing them to stand; and instead of kneeling, he bent one knee, occasionally touching the ground with it. The hard-headed Mr. Martin followed him up, and moved the privy council to enforce obedience to their monition. 39 L. J. R. (N. S.) Ec. Cas. 11. The ingenious reverend gentleman made a very pretty argument, in person, in his own defense, which deserves rehearsing, as to the kneeling, at least. He says: "It is defined in Bailey's Dictionary, 'to bear oneself upon the knees.' I maintain, as regards the charge of kneeling, that kneeling is a distinct posture. The body

must rest upon the knees. It is true, Dr. Johnson gives a different definition, but all his four examples fall within Bailey's definition; 'to perform the act of genuflexion,' 'to bend the knee.'

> 'When thou dost ask my blessing, I'll kneel down,
> And ask of thee forgiveness.'—*King Lear.*
>
> 'Ere I was risen from the place that shewed
> My duty, kneeling,' etc.—*Ibid.*

'A certain man kneeling down.' Matt. xvii, 14. 'At the name of Jesus every knee should bow.' Phil. ii, 10. Bowing the knee is a distinct act from kneeling. Bishop Taylor says, 'As soon as you are dressed kneel down.' *Guide to Devotion.* In every instance in the prayer book, 'kneeling' is used to express the going upon the knees. Two things are necessary to a kneeling, first, that the body should rest upon the knees; secondly, that it should be for an appreciable time." He did not claim that his genuflexions were the result of any weakness in the knees, but boldly said, "I bend the knee as an act of reverence." This, of course, put the matter beyond any doubt, and in respect to the kneeling, the court held that his peculiar evasion left him but one leg to stand on in physics, and none at all in law, and monished him not to do so any more. In respect to the candles, they expressed their disapprobation of the trick, but held that the reverend blower-out was technically within the monition. As to the elevation of the elements, the same may be said, the court holding that the point was not properly before the court, but declared that they should hold, if it ever be-

came proper for them to do so, that "any elevation, as distinguished from the raising from the table," is unlawful. One would suppose that, having cornered him on the charge of kneeling, the court would have shown some respect for their own decrees by punishing the infringement, but this clerical flea was not so easily caught. He had, like the prudent man, foreseen the evil, and hidden himself behind an affidavit that "he had never intentionally or advisedly, in any respect, disobeyed or sanctioned any practices contrary to the provisions of the monition;" *i. e.*, he supposed he had successfully evaded them. Their lordships thought themselves bound, as christian gentlemen and lawyers, to give the affiant the benefit of this christian-like and gentleman-like, if not lawyer-like, affidavit, and so declined to punish him further than "to mark their disapprobation of such a course of proceeding"—to wit, the kneeling—"by directing that he should pay the costs of the present application;" which, after all, I dare say, is no light punishment in England. This ingenious clergyman, who thought to evade the decree of the court against kneeling by bending one knee only, should have remembered the fate of "Peeping Tom," of Coventry, that

> "one low churl, compact of thankless earth,
> The fatal by-word of all years to come,"

who, when Lady Godiva was riding by, "clothed on with chastity," risked one eye at an augur hole, and whose

> "*eyes*, before they had their will,
> Were shriveled into darkness in his head,
> And dropt before him."

But if he had possessed that acquaintance with the scriptures which I have (through the medium, in this instance, of Webster's Unabridged Dictionary), he would, on leaving the presence of this tyrannical court, have hurled at them this parting text: "And he *kneeled down* and cried with a loud voice, Lord, lay not this sin to their charge." Acts, vii, 60.

But we have not yet done with this reverend caviler. In November, 1870, the privy council were invoked to punish him for fresh disobedience to the monition, in respect to prostration and elevating the paten and cup. It was alleged and admitted that he had removed the wafer bread from the paten, and elevated the bread, instead of the paten; and it appeared that the upper part of the cup was elevated above the head. The accused claimed that the elevation was accidental and unintentional; but as he admitted that he had carefully scanned the monition with the determination to yield only a literal obedience to its precise terms, the court held that he must suffer for even a literal violation, on the principle that they that take the sword shall perish by the sword. The accused, also, having met with such bad fortune in his genuflexions, notified his curates that he intended thenceforth to bow without bending the knee, at that part of the prayer of consecration where he had formerly knelt, and so, instead of kneeling, he made a low bow, and remained in that position several seconds. This the court held to be an unlawful prostration of the body. He was amerced in costs, and suspended from office for three months, and thus left with

nothing to hold up but his hands, and with full liberty to bow his head if he had any shame left.

In January, 1870, "the office of the judge was promoted"— whatever they may be — "by the bishop of Winchester against the Rev. Richard Hooker Edward Wix, vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight." The vicar was charged with ecclesiastical offenses, namely, with having caused two lighted candles to be held on either side of the priest, while reading the gospels, and with having lighted candles on the communion table, or on a ledge or shelf immediately above it, having the appearance of being affixed to and forming part of it, during the celebration of the holy communion, at times when they were not needed for light; also, with using incense, etc., etc. In respect to the first charge, the vicar admitted and defended the practice, but the court held it unlawful, and "monished" him. In regard to the second charge, Wix becomes a dangerous rival to Mackonochie, in the science of evasion, for although he admits the lighted candles, yet he says they were not on the communion table, on the ledge or shelf behind it, but on a separate table, called a re-table, not appearing to form a part of the communion table. I think, on the whole, he is rather superior to Mackonochie, for the latter had to put his candles out just before communion, but Wix defiantly kept his burning by means of the convenient re-table. But it appearing in evidence that the re-table was placed directly behind the holy table, and had a shelf or ledge, which looked like a mantel-piece over the holy table, the court held that

this would not answer, and so the court ordered Wix snuffed out. As to the incense Wix claimed that the censing was done only during the interval between morning prayers and communion, accompanied by processions and tinkling of bells, and that the censing was not within the prohibition of the law, because it was not done during any service. But the court thought there was no sense in this argument; Wix might as well claim that a slice of ham is no part of a sandwich, because it is between two slices of bread; and he was monished against this practice also, and condemned to pay costs, which last probably incensed him most thoroughly. 39 L. J. R. (N. S.) Ec. Cas. 25.

In the same report, at page 28, is found the case of *Elphinstone* v. *Purchas*, in which the matters of vestments, mixing water with the wine, administering the bread in form of wafers, etc., were gravely and elaborately considered. The defendant did not appear, and so the plaintiff, who was a colonel in the army, had a clear field. After eleven pages of discussion and examination, Dr. Phillimore concludes that Mr. Purchas might wear all the regalia which he was accused of wearing, except "a cope at morning or at evening prayer; also, with patches, called apparel; tippets of a circular form; stoles of any kind whatsoever, whether black, white or colored, and worn in any manner; dalmatics and maniples." The "biretta" or cap appeared to the doctor "as innocent an ornament as a hat or a wig, or as a velvet cap." Processions and incense were pronounced illegal. Blessing the candles was forbidden. So, as to announcing "a mortuary celebra-

tion for the repose of a sister," and interpolating a prayer for the rest of her soul. Wafers were not disapproved of, nor was mixing water with the wine, so long as it was not done at the time of the celebration. Placing on the holy table a veiled crucifix, and unveiling it and bowing, and doing reverence to it, was deemed objectionable. But flowers on the holy table were approved. It was held, for the sake of protestantism and good manners, that the priest must not turn his back on his people, except during proper prayers. It only remains to remark, that placing a figure of the infant Saviour, with two lilies on either side, and a stuffed dove, in a flying attitude, over the credence and the holy table, respectively, was reprehended. All this occupies twenty-five double-columned pages of the report. But on appeal, all the "eucharistic vestments," including the innocent "biretta," were held unlawful, and the clergy were restricted to the poverty of cope and surplice; the use of the mixed chalice and wafer bread was also pronounced illegal.

So much for rites and ceremonies. But when we come to the efforts of the courts to keep the ritualists straight in doctrinal matters, we are lost in amaze. Take the case of *Sheppard* v. *Bennett*, for instance. 39 L. J. R. (N. S.) Ec. Cas. 68. The charge was, that the defendant inculcated the doctrine of the visible presence of our Lord in the elements, and the adoration of the elements themselves. The language used was: "I myself adore and teach the people to adore Christ, present in the sacrament, under the form of bread and wine, believing that under their veil is the

sacred body and blood of my Lord and Saviour Jesus Christ." The language at first was, "to adore the consecrated elements, believing Christ to be in them," but this was corrected as above. The court held that this amended language does not necessarily imply a belief in the actual presence, and an adoration of the elements themselves. The words by which it is preceded, however, would seem to render this judgment extremely charitable, to say the least: "I am one of those who burn lighted candles at the altar in the day-time; who use incense at the holy sacrifice; who use the eucharistic vestments; who elevate the blessed sacrament."

If, after believing and doing so much, he does not believe what he is accused of, he must be remarkable. If a man should tell us, "I am copper-colored; I go nearly bare and paint my body, and wear rings in my lips and nose; I live in a wigwam; I sail in a birch bark canoe; my weapons are bow and arrow, knife and club; I am in the habit of scalping my enemies, and of getting intoxicated on whisky; but I am not an Indian," the natural inquiry would be, What are you, then? And if you should believe him, for the reason that a great many other Indian disclaimants had told you the same story, you would use exactly the reasoning that Dr. Phillimore uses to arrive at his conclusion, at the end of fifty-three pages of fine print, in double columns. Peter, the patron saint of all these credulous theologians, persisted in denying *his* Master, although his "*speech* bewrayed him." The learned Doctor hopes that nothing that he has said may yet further tend to

"make this banquet prove
A sacrament of war, and not of love."

He says he does not sit "as a critic of style, or an arbiter of taste, or a censor of logic," and has "not to try Mr. Bennett for careless language, for feeble reasoning, or superficial knowledge." And he concludes that Bennett is saved from harm by the fact, that, in sentencing him, he should be passing sentence "upon a long roll of illustrious divines who have adorned our universities and fought the good fight of our church, from Ridley to Keble; from the divine whose martyrdom the cross of Oxford commemorates, to the divine in whose honor that university has just founded her last college." And he showed his leaning toward freedom of religious opinion by making no order as to costs. I must do the doctor the justice to say that he does not seem to regret his enforced decision, and even cites the decision of the privy council, that the words "everlasting fire" might be treated by a clergyman as not denoting the eternity of punishment.

But the humor of the matter consists in the necessity of having a court to adjudge what religious opinions a man may or may not teach, and what rites and ceremonies he may or may not observe. Of course it is the theory of government that renders this necessary, but the humor of it is none the less apparent on that account. If *our* clergymen take leave of their senses, we soon find a way to restore their wits — we cut off their temporal supplies. If we disagree with *our* clergyman, we don't let him turn us out — we turn him out. Our theory is that the clergy and the Sabbath are

made for man, not man for the clergy and the Sabbath. All judicial inquiries into one's religious opinions and ceremonial preferences strike us oddly. We do not see, of course, why the Lord High Chancellor should not be just as well invoked, at the complaint of the Royal Geographical Society, to monish a man against saying and publishing that the world is flat, or, at the instance of Mr. Froude, to warn a rival historian against pretending that Henry VIII was not a conjugal saint. In short, affairs proceed in this country upon the principle of the menagerie keeper, who, when asked whether a certain animal was a monkey or a baboon, replied: "Whichever you please — you pays your money, and you takes your choice." But in England you pay your money and have no choice.

TRADE-MARKS.

ONE of the most fertile subjects of conversation in the commercial world is the rascality of lawyers. To hear the unanimous opinion of tradesmen one would infer that, among the latter, at least, there is no such thing as cheating one another; that such is the purity of the atmosphere of trade, that no merchant ever contrives to filch away another's customers, and that one's ownership of his own is universally respected. In spite of the bad odor in which we are held by the mercantile world, we do not remember of ever hearing ourselves accused of stealing one another's signs, or forging one another's handwriting, or resorting to any other mean device to get business that does not belong to us. I fear that so much cannot be said of our critics. Here is an entire branch of the law devoted to the subject of the protection of merchants against the piracy of their fellows. One merchant imitates the peculiar commodity or invention of another; the law says he must not do this, and gives the latter the privilege of affixing a peculiar mark upon it to denote his proprietorship; the other then steals the mark, too, and the law then punishes the latter infraction. All this not only furnishes inevitable employment to those unprincipled lawyers, of whom we started out to speak, but gives rise to a vast amount of metaphysical and abstruse law-learning.

Out of this I propose to extract any alleviating phases of humor that may not be altogether patent, although the subject of investigation may be.

The poets have differed in their estimates of the importance of a name. One asks, "What's in a name? that which we call a rose by any other name would smell as sweet;" and another talks about "the magic of a name." But the experience of practical men has demonstrated that Campbell is right. The success of a book, a play, a commodity, is very dependent upon its name, and the success of men themselves is frequently hindered by a ridiculous or common-place name. The only man with a common name who ever achieved fame, according to our recollection, was John Brown, and even he would not, had it not been for the fortunate circumstances of his failing in his enterprise and being hanged. The modern novelists have recognized "the magic of a name," and have named their offspring in a way to excite curiosity and surmise. Frequently their productions are named without any regard to appropriateness. Thus, "Cometh up as a Flower," so suggestive of the frailty of human existence, and which has accordingly been bought by all the pious persons in the land, turns out to be a very nasty tale of attempted seduction. "Ruskin on Types," it is said, was once inquired for by a printer, and John Hill Burton tells a story of a sheep-breeder who went to a hardware store to buy a "hydraulic ram" for the improvement of his flock. But I am straying from my subject.

It was formerly said that a trade-mark, to be en-

titled to judicial protection, must in itself indicate the origin or ownership of the article to which it belongs. This idea has been very materially modified by modern decisions. The rule is well stated by Lord Langdale in *Perry* v. *Truefitt* (6 Beav. 56): "A man may mark his own manufacture, either by his name or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a peculiar person, no other trader has a right to stamp it upon his goods of a similar description." As an illustration, the words "Congress water" do not indicate either origin or ownership, for the water is a natural product, and no one would, for a moment, conceive our members of Congress as having any interest in such a subject; and yet the phrase has been held a valid trade-mark. So much the law concedes to a natural beverage described by a "fancy name." But artificial beverages are viewed with less complacency, and "Schiedam Schnapps" may be made and sold by any one. So it was held in *Wolfe* v. *Burke* (7 Lans. 151), and although Mr. Wolfe was the first to introduce this delicate article of alcoholic stimulant to the American palate, yet any one may keep the wolf from his door by manufacturing and vending it.

It is a well-settled principle that a *colorable* imitation of one's trade-mark or designation will be restrained by a court of equity. This received exemplification in the case of *Christy* v. *Murphy* (12 How. 77). The plaintiff organized and established, in 1842, a band of performers of negro minstrelsy,

and named it after himself, "Christy's Minstrels." He was the first who established this species of entertainments. When he commenced it he incurred some expenditure of time, labor and money, and continued it successfully until 1854, when he suspended it and went to California. In his absence the defendants, most of whom had been employed by him in his band as performers for hire, assumed the style and name of "Christy's Minstrels." The plaintiff, desiring to reinstate his own band under that name, prayed an injunction against this conduct of the defendants, and it was granted. Judge Clerke, who gave the opinion of the court, and who seems a wise and merry Clerke, such as would have rejoiced the heart of Chaucer, utters some very sensible legal, hygienic and ethical observations. He says: "'Man does not live by bread alone;' the complete enjoyment, even of his physical existence, does not depend upon mere food or raiment or other material substance, but upon the exercise of the various and numerous moral and mental faculties with which God has endowed us. It may be as necessary to laugh as to eat; and I am persuaded, if people *would eat less and laugh more*, that their moral as well as physical well-being would be materially improved. The gravest of poets sings:

> 'The love of pleasure is man's eldest born;
> Wisdom, her younger sister, though more grave
> Was meant to minister, and not to mar
> Imperial pleasure, queen of human hearts.'"

And the judge concludes that the entertainment afforded by Mr. Christy deserves the protection of

the court against fraudulent imitations, and that, in the use of his name, the defendant must "keep dark."

Can a picture become a trade-mark? It was doubted by the Supreme Court of California in *Falkinburgh* v. *Lucy* (35 Cal. 52). Judge Sanderson, in that case, shows a keen sense of the humorous in his description of the picture in question. He says: "The plaintiff's label has a highly-colored picture, representing a washing-room, with tubs, baskets, clothes-lines, etc. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing, and clouds of steam are gracefully rolling up from the tubs, and dispersing along the ceiling. In the back-ground is extended across the room a clothes-line, upon which are suspended stockings and other undergarments, which have evidently just been put to use in testing the cleansing properties of the plaintiff's washing-powder. To the left of the washerwoman stands a lady in a yellow bonnet, red dress, green congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket, and in her left hand is held a red parasol; while the other hand, which is encased in a green glove, is gracefully extended toward the nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow-and-green clothes-basket, full of dirty linen, and a yellow-and-green

soap packing-box, upon which are printed, in small capitals, the words 'Standard Co.'s Soap.' Each wash-tub is supported by a four-legged stool — some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to color, is in part of a yellowish green, and in part of a greenish red, while the walls are of a grayish blue. This is but an imperfect description of the picture with which the plaintiff's label is adorned. The design is good, for it is eminently suggestive of the plaintiff's goods." The judge has a good eye for color, it seems, and might make himself very useful in writing descriptions, for the religious newspapers, of the "chromos" which they are so much in the habit of offering as inducements to subscribers. But we have never seen why a picture may not be made as good a trade-mark as any thing else, under Lord Langdale's rule.

However this may be, it would doubtless be conceded that an artist's or engraver's device placed upon a picture by way of trade-mark, would be protected from imitation. Thus, the letters A. D. in the form of a monogram, the well-known device of Albert Durer, could not lawfully be adopted by another engraver of a different name, although he should place after the letters the year of grace in which the work was produced, thus giving to the letters, when accurately viewed, the force simply of "*Anno Domini.*" And this is the extent to which a man can make a trade-mark of his own name. Those of a different name may be restrained from assuming his name and mark, and others of the *same* name from imitating his peculiar device.

One accurate observer has seemed to think that trade-marks on pictures to denote their subjects are very useful. Mark Twain, in "Innocents Abroad," after explaining how he is able to recognize pictures of St. Mark, St. Matthew and St. Sebastian, by the presence of the lion, the book and the pen, and the arrows, respectively, goes on to remark: "When we see other monks, looking tranquilly up to heaven, but having no trade-mark, we always ask who those parties are."

It is always a familiar principle that equity will not lend its aid to restrain imitations of articles which are themselves deceptive and false in their appellation. Thus, in *Fetridge* v. *Wells* (13 How. 385), where the plaintiff made a liquid soap, composed of palm oil, pot-ash, alcohol and sugar, and called it "Balm of Thousand Flowers," he was denied an injunction to restrain the defendant from doing the same thing. In other words, although the plaintiff came into court with so much soap, he did not come with "clean hands." I have seldom seen a case exhibiting a judge in such a prosaic and unimaginative light as this. Judge Duer actually denied an injunction on the ground that the title of the plaintiff's soap was false and fraudulent, and induced the public to believe that it was concocted of many flowers! He satirically calls the article a "precious compound," and spends several pages in the severest judicial denunciation of the inventor. He quotes Webster and Johnson to show that "balm" means "an aromatic vegetable juice, whether extracted from trees, shrubs or flowers." What he would do to one who should call a soap "Balm of Gilead,"

does not appear. But however matter-of-fact the judge was as to the title, he was sound when he came to criticise the paper of directions, which promised that the preparation would cure nearly every ill that flesh is heir to; and not even the "ingenious pleasantry" of "the able counsel for the plaintiff, to whom he always listened with pleasure, and not unfrequently with instruction;" nor his own concession that "it would be difficult for a judge of the most approved and habitual gravity to read this paper of directions without a smile:" nor his own pleasantry, that "it would seem that so long as the 'Balm of Thousand Flowers' may be procured, it will be folly to grow old and a mistake to die," could cause him to forget his duty to refuse to aid the plaintiff in obtaining a monopoly to deceive the public. To show how doctors will disagree, I may cite the opinion of another judge of the same court upon a similar application, in respect to the very same article. Judge Hoffman could see no great harm in the title of the article, and said: "If a man should compound tallow with some high scent and beautiful coloring matter, and term it the 'Ointment of Immortality,' he has a right to appropriate so much of public credulity as he can by this designation." He also remarked that the further removed an application is from an accurate description of the article, the more decided and exclusive becomes the right to it. He cited the case of the "Medicated Mexican Balm," which had nothing in its composition peculiar to the land of Montezuma, and the "Chinese Liniment," which was an utter stranger to the celestial empire. (See *Fetridge* v. *Merchant*, 4 Abb. 156.) Mr. Brown, in

his original and ingenious treatise on trade-marks, takes similar ground. He says: "We are not deceived into thinking that there is any 'gold dust' in the whisky that bears that name; or that an illuminating oil is verily 'Mineral Sperm Oil;' or that pills are really 'everlasting.'" I am quite inclined to agree with the latter authorities, and to believe that the public are not so credulous as Judge Duer seems to think. At all events, I think that Judge Sutherland lays down the true doctrine in *Comstock* v. *White* (18 How. Pr. 421). "As to the public," says he, "if these pills are an innocent humbug, by which the parties are trying to make money, I doubt whether it is my duty, on these questions of property, of right and wrong between the parties, to step outside of the case, and to abridge the innocent individual liberty which all persons must be presumed to have in common, of suffering themselves to be humbugged." A doctrine previously enunciated in substance by Butler:

> "Doubtless the pleasure is as great
> Of being cheated as to cheat."

And by *The Spectator:* "There is hardly a man in the world, one would think, so ignorant, as not to know that the ordinary quack doctors, who publish their great abilities in little brown billets, distributed to all that pass by, are, to a man, imposters and murderers; yet such are the credulity of the vulgar, and the impudence of those professors, that the affair still goes on, and new promises of what was never done before are made every day."

The principle of *Fetridge* v. *Wells* was less dubi-

ously illustrated in *Hobbs* v. *Francais* (19 How. 567). The plaintiff manufactured a cosmetic powder called "Meen Fun," and represented on his labels that it was "patronized by Her Majesty the Queen," and that the plaintiff's place of business was in London. It appearing that the article was really manufactured in New York, a motion for an injunction against the defendant's manufacture of a similar article, by the same name, was refused, the court remarking: "Her Majesty the Queen is probably ignorant of its virtues or even of its existence." And again, in *Fowle* v. *Spear* (7 Penn. L. J. 176). the complainant applied for an injunction to restrain the defendant from using wrappers, labels and bottles resembling those used by him in his business of selling "Wistar's Balsam of Wild Cherry." It was claimed, by the complainant's wrappers, that his preparation was a specific for nearly every imaginable disease. This was too much for the court, who observed: "It is not the office of chancery to intervene, by its summary process, in controversies like this; '*non nostrum tantas componere*,'" which, being translated, I suppose must mean "it is not ours to decide about a nostrum."

Curtis v. *Bryan* (36 How. 23) is an entertaining case in several particulars. Previous to 1844, Mrs. Charlotte N. Winslow prepared a composition for children teething, which she used with success. In that year, she gave the receipt to her son-in-law, the plaintiff, who commenced its manufacture and sale under the name of "Mrs. Winslow's Soothing Syrup," and with the approval of Mrs. W., he made *that* his trade-mark, and the article has achieved an